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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted]49

W. S. PAYNE, L. H. POWELL, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF KANSAS EX REL. S. M. BREWSTER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

[redacted]

(28,000)

(25,569)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

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In the Supreme Court of the State of Kansas.

No. 20234.

THE STATE OF KANSAS, ex Rel. S. M. BREWSTER, Attorney-General, Plaintiff,
vs.
J. C. MOHLER, as Secretary of the State Board of Agriculture, et al., Defendants.

Original Proceedings in Mandamus.

Plaintiff's Abstract.

S. M. Brewster, Attorney-General; S. N. Hawkes, J. L. Hunt, Assistant Attorneys-General, Attorneys for Plaintiff.

17 In the Supreme Court of the State of Kansas.

No. 20234.

THE STATE OF KANSAS, ex Rel. S. M. BREWSTER, Attorney-General, Plaintiff,
vs.
J. C. MOHLER, as Secretary of the State Board of Agriculture, et al., Defendants.

Plaintiff's Abstract.

On the 2d day of July, 1915, said plaintiff filed its motion or application herein for a writ of mandamus, and upon the same day a writ was issued, which was and is in words and figures as follows, to wit (caption omitted):

Writ of Mandamus.

Whereas, In the above case a duly verified motion has been presented by the attorney-general of the state of Kansas, showing that the defendant, W. S. Payne, has paid the sum of ten dollars to the defendant, J. C. Mohler, as secretary of the State Board of Agriculture of the state of Kansas, as the fee for a license to do a commission business in farm produce in the state of Kansas, but that said sum was paid under protest; and

Whereas, The said J. C. Mohler, on account of such payment under protest, refuses to pay said fee into the state treasury of the state of Kansas, as required by section 2 of chapter 371, Laws of Kansas of 1915, on account of threats made to the said J. C. Mohler to hold him personally liable for the repayment of said sum, and of all expenses and costs incidental to the recovery of same; and

Whereas, Certain other commission merchants within the state of Kansas are making claims that said chapter 371, Laws
18 of Kansas of 1915, is invalid and that the enforcement of the provisions thereof by the said J. C. Mohler will be illegal and wrongful and subject the said J. C. Mohler to liability for damages, and all persons being desirous of the determination of the question as to the validity of said chapter 371:

Now, Therefore, This is to command you, the said J. C. Mohler, secretary of the State Board of Agriculture of the state of Kansas, to forthwith pay into the state treasury the said sum of ten dollars, and all other sums heretofore or that may hereafter be received by you as fees for licenses to do business as commission merchants within the state of Kansas, or that on or before the 20th day of July, 1915, you show to this court good cause why said payment should not be made; and it is further ordered that the said W. S. Payne, and all other persons interested in any fees so paid heretofore or hereafter to the said secretary of the State Board of Agriculture of the state of Kansas, come into this court and set up any claim that they have to said fees or any part thereof, or show good cause why the provisions of said chapter 371 be not enforced by said secretary of said State Board of Agriculture.

On the 26th day of July, 1915, said defendant, J. C. Mohler, as secretary, etc., filed his answer herein in words and figures as follows (caption omitted):

Separate Answer of J. C. Mohler.

Comes now defendant, J. C. Mohler, and for his answer to the application and writ herein states:

First. This defendant admits the statements and allegations contained in the application and the facts stated in the writ.

Second. The defendant states that he has no personal interest in the cause of action herein other than his desire to faithfully carry out all valid provisions of the law relating to the sale of farm produce on commission and to faithfully perform his duty.

This defendant stands ready to pay over all fees received by him to the state treasurer whenever satisfied that he will incur no personal liability by so doing.

19 This defendant, therefore, asks that this court make such order, without cost to this defendant, as to the court shall seem proper, and that if any defendant or other person has any claim for any fees in the hands of this defendant and referred to in this case, such person be required, at his own expense and

without expense to this defendant, to come into court and set up any claim that he may have to said fees.

On the 23d day of July, 1915, L. H. Powell and thirty others, having heretofore obtained leave of court to intervene herein, filed their verified answer herein in words and figures as follows (caption omitted):

Answer of Interveners.

Having been granted leave by this court to interplead in the above-styled matter, there to show good cause why the provisions of chapter 371 of the Session Laws of 1915 of the state of Kansas should not be enforced by the secretary of the State Board of Agriculture of the state of Kansas, and to answer to the writ of mandamus issued out of this court on the 2d day of July, 1915, to J. C. Mohler, secretary of the State Board of Agriculture, W. S. Payne and others interested do now interplead in the above-styled matter and file this their answer to said writ of mandamus, and allege:

First. That these interveners and each and all of them are persons, firms or corporations having their post-office addresses and places of business at Wichita, in Sedgwick county, Kansas, where they are engaged in the grain business. That as an incident of such grain business they receive, sell and offer for sale grain on commission, same being an agricultural product of the soil.

Second. That the writ of mandamus directed herein to J. C. Mohler, secretary of the State Board of Agriculture of the state of Kansas, and to W. S. Payne, commands among other things, that said defendants and all other persons interested in any license fees heretofore or hereafter to be paid to said secretary of the State Board of Agriculture under the provisions of chapter 371 of the Session Laws of Kansas of 1915, come into this court and set up any claim that they have to said fees or any part thereof, or show good cause why the provisions of said chapter 371 be not enforced by
20 said secretary of the State Board of Agriculture. That these interpleaders are subject to the provisions of said chapter 371 if said act is valid, and as commission merchants are interested in a determination by this court of the validity and constitutional-ty of said act.

Third. That these interpleaders, in the usual course of their business as grain dealers, and as a part of such business, receive shipments of grain on consignment from elevators and country dealers, and sell such shipments for said consignors and charge for such services an agreed commission. That by the usages and customs of the grain trade, such consignments are handled in the following manner:

A country shipper, desiring to have any one of these interpleaders sell grain for him, is accustomed to and does send to such interpleaders a bill of lading covering the car of grain desired sold, to which bill of lading is attached a draft drawn by the consignor on such interpleader for the approximate value of the shipment. That

such interpleader is required to and does pay such draft before he can secure such bill of lading and dispose of said car for the consignor. That the payment of such draft is in effect a payment in advance by such interpleader to said shipper of the sale price of such grain. That after the sale of such grain for the shipper, such interpleader renders to his consignor an account of sales, showing the amount and quality of the grain sold, the price received, the name of the purchaser, together with a statement of the necessary charges incurred in making such sale, such as weighing and inspection charges, freight, demurrage and switching charges, etc., including a commission of a stipulated sum per bushel, which is retained by such interpleader, and if the net proceeds of the sale of such grain exceed the sum previously advanced to the shipper by payment of his draft, such interpleader at once pays to his consignor the balance due him, or in case the net avails of such sale due the consignor is less than the sum previously advanced to the shipper, as aforesaid, such interpleader immediately demands repayment from such shipper of such balance so overpaid him.

That in truth the average amount of the advances made by these interpleaders to their consignors, as aforesaid, exceeds the net avails of the sale of such consigned grain, and on the average con-
21 signment these interpleaders overpay their consignor in advance.

That the agricultural products of the soil sold by these interpleaders on commission, as aforesaid, are sold on weights and grades determined by weighers and inspectors legally appointed for such purposes at a market price fixed by the world, and these interpleaders have no control over the grade, quantity or price, or the fixing thereof, of the grain sold by them, as aforesaid, the quantity and quality of such grain being known to such consignor before shipment.

That these interpleaders' business of selling grain on commission as aforesaid is not with the public at large, but is with a limited class of country elevators or grain dealers and is not injurious or dangerous to the public or affected with a public use or interest.

That the business relations of these interpleaders with their consignors, as aforesaid, is contractual and entered into at the pleasure of such consignors, and neither usage, law, necessity or fairness compels such country shippers to have their grain sold on commission in the manner aforesaid.

That these interpleaders, and all of them, are engaged in the same business, to wit, the grain business, in the same county, to wit, Sedgwick county, Kansas, and belong to the same class of grain dealers, to wit, sellers of grain on consignment for a commission.

Fourth. That the interpleaders herein are each and all members of the Wichita Board of Trade, which organization governs the business conduct of its members in the handling of the grain business as aforesaid, and, as such members, these interpleaders are required to be and are of financial and moral responsibility.

Fifth. That J. C. Mohler, secretary of the State Board of Agri-

culture, defendant herein, has required of these interpleaders and all of them that they comply with said chapter 371 of the Laws of Kansas of 1915, and that they procure from him a license at a cost of $10 each, and that they file with him a surety-company bond in the minimum sum of $2,000, conditioned as required by said act. That such surety-company bond can not be procured as required at a cost of less than $10 per annum.

22 That said chapter 371 of the Laws of Kansas of 1915, being "An act in relation to the sale of farm produce on commission," is wholly void, and confers upon the secretary of the State Board of Agriculture no rights or authority whatever, and no right or authority to enforce said act of the legislature as to these interpleaders, and no right or authority to require compliance with the provisions of said act.

These interpleaders allege and show that said act of the legislature of Kansas is wholly void, in that:

First: Said act contains more than one subject, which is not clearly expressed in the title thereof, and is violative of article 2, section 16 of the constitution of the state of Kansas.

Second. Said act confers upon the State Board of Agriculture, a corporation, and upon its secretary, the power to issue and revoke licenses, to investigate the conduct, business and books of citizens of the state of Kansas, to collect fees, take money and to disburse same, and otherwise by special act confers corporate power, and is violative of article 12, section 1 of the constitution of the state of Kansas.

Third. Said act deprives citizens of the United States and of the state of Kansas and these interpleaders of their right to conduct their lawful business without interference, and is violative of the provisions of the constitution of the state of Kansas and of the constitution of the United States.

Fourth. Said act discriminates against these interpleaders and in favor of other citizens of the same class, and denies to citizens of the United States and of the State of Kansas and to these interpleaders the equal protection of the law, and is violative of the provisions of the constitution of the state of Kansas and of the constitution of the United States.

Fifth. Said act deprives citizens of the United States and citizens of the state of Kansas and these interpleaders of their property and property rights without due process of law, and is violative of the provisions of the constitution of the United States and of the constitution of the state of Kansas.

Sixth. Said act confers judicial power upon other than judicial officers, in that it empowers and authorizes the secretary of the State Board of Agriculture to judicially and finally determine the rights of property of citizens of the United States and of the state

23 of Kansas and of these interpleaders, and is violative of the provisions of the constitution of the United States and of the constitution of the state of Kansas.

Seventh. Said act authorizes and empowers the secretary of the State Board of Agriculture, who could not be the real party in in-

terest, to bring and prosecute an action against these interpleaders and their bondsmen on the bond required by said act, to be filed by these interpleaders with said secretary, and is violative of the provisions of the constitution of the United States and of the constitution of the state of Kansas.

Eighth. Said act is a special law enacted by the legislature of the state of Kansas when a general law can be made applicable to the matters and things controlled, regulated and governed by said act, and is violative of article 2, section 17 of the constitution of the state of Kansas.

Wherefore, These interpleaders pray that the writ of mandamus prayed for by plaintiffs herein be denied, and that chapter 371 of the Laws of Kansas of 1915 be determined by this court to be void, and that the secretary of the State Board of Agriculture of the state of Kansas has no right or authority to enforce said act. And these interveners further pray for their costs in this matter incurred.

On the 5th day of August, 1915, said defendant W. S. Payne filed his verified answer herein, in words and figures as follows (caption omitted):

Answer of W. S. Payne to Motion for Writ of Mandamus.

Comes now the above-named defendant, W. S. Payne, and admits that he is a resident of Wichita, Sedgwick county, Kansas, and is there engaged in the business of receiving farm produce for sale upon commission, and selling and offering to sell such farm produce on commission at the city of Wichita, and in this state, and is a commission merchant; and defendant further admits that the above-named relator, S. M. Brewster, is the duly elected, qualified and acting attorney-general of the state of Kansas; that the above-named defendant, J. C. Mohler, is the duly elected, constituted, qualified and acting secretary of the State Board of Agriculture of the state of Kansas.

24 Said defendant further admits that he has paid the sum of $10, as provided by chapter 371 of the Statutes of Kansas of 1915, under protest, as alleged in plaintiff's motion herein, and this defendant files this answer herein for himself and all other commission merchants in the state of Kansas similarly situated in the controversy herein, as appears from this answer.

For further answer defendant says that he is now and for more than a year has been engaged in the business as aforesaid in the city of Wichita, Kansas, and that the value of said business and the right to transact the same in the city of Wichita is of the value of more than $10,000.

Plaintiff further avers that the legislature of the state of Kansas, in the session known as the session of 1915, enacted a pretended statute or law known as house bill No. 632, and after its pretended enactment published as chapter 371 of the Session Laws of 1915. And it is now claimed and averred by the relator herein that said enactment has become a valid law of the state of Kansas on May

22, 1915, the date of the publication of the statute book containing the statutes enacted by said session of legislature, and that the same is as follows:

Chapter 371.

Sale of Farm Produce on Commission—License Required.

An Act in Relation to the Sale of Farm Produce on Commission.

Be it enacted by the Legislature of the State of Kansas:

Section 1. Definitions as used in this article. (*a*) The term "commission merchant" shall include every person, firm, exchange, association and corporation licensed under this article to receive, sell or offer for sale on commission within this state any kind of farm produce; except where such farm produce is sold for consumption and not for resale. This article shall not apply to the sale of farm produce at public auction by any auctioneer acting as the agent of another to whom such farm produce shall have been consigned; nor shall this article apply to seeds sold at retail. (*b*) The term "farm produce" shall include all agricultural, horticultural, vegetable and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts and honey, but shall not include timber products, floricultural products, tea or coffee.

Sec. 2. Sale of farm produce on commission; license therefor. On and after July first, nineteen hundred and fifteen, no person, firm exchange, association or corporation, shall receive, sell or offer for sale on commission within this state any kind of farm produce, without a license as provided for in this article. Every person, firm, exchange, association and corporation in this state receiving farm produce for sale on commission shall annually, on or before June first, file an application with the secretary of the State Board of Agriculture for a license to do a commission business in farm produce. Such applicant shall state the kind or kinds of farm produce which the applicant proposes to handle, the full name of the person, firm, exchange, association or corporation applying for such license, and if the applicant be a firm, exchange, corporation or association, the full name of each member of the firm, or the names of the officers of the exchange, association or corporation, and the name of the local agent of the exchange or association, and the city, town or village and street number at which the business is to be conducted. Such applicant shall further satisfy the secretary of the State Board of Agriculture of his or its character, responsibility and good faith in seeking to carry on a commission business. The secretary of the State Board of Agriculture shall thereupon issue to such applicant, on payment of ten dollars and the execution and delivery of a bond as hereinafter provided, a license entitling the applicant to conduct the business of receiving and selling farm produce on commission at the place named in the application and until the first day of July next follow-

ing; provided, that the money so collected shall be turned into the state treasury and there be set apart as a fund to be used by the secretary of the State Board of Agriculture in the conduct of this department.

Sec. 3. Bond. Before such license shall be issued every applicant shall execute and deliver to the secretary of the State Board of Agriculture a straight indemnity bond, satisfactory to the secretary of the State Board of Agriculture, to secure the honest accounting and payment to the consignor for goods consigned to such person for sale. Any consignor may bring action upon said bond in any court of competent jurisdiction to recover payment for goods delivered to the commission merchant, when to recover any moneys received and not honestly accounted for.

Sec. 4. Power of the secretary of the State Board of Agriculture to investigate. The secretary of the State Board of Agriculture or his assistants shall have power to investigate, upon the verified complaint of any interested person, also to make an investigation irrespective of whether or not a complaint is filed, the record of any person, firm, exchange, corporation or association applying for a license, or any transaction involving the solicitation, receipt, sale or attempted sale of farm produce on a commission basis, the failure to make proper and true accounts and settlements at prompt and regular intervals, the making of false statements as to conditions, quality or quantity of goods received, or while in storage, the
26 making of false statements as to market condition with intent to deceive, or the failure to make payment for goods received or other alleged injurious transactions; and for such purpose may examine at the place of business of the licensee, that portion of the ledgers, books of account, memoranda, or other documents, relating to transactions involved, of any commission merchant, and may take testimony therein under oath. When a consignor of farm produce fails to obtain satisfactory settlement in any transaction, after having notified the consignee, a certified complaint may be filed at the expiration of ten days with the secretary of the State Board of Agriculture. The secretary of the State Board of Agriculture shall attempt to secure an explanation or adjustment. Failing this, within seven days he shall cause a copy thereof, together with a notice of a time and place for a hearing of such complaint, to be served personally or by mail upon such commission merchant. Such service shall be made at least seven days before the hearing, which shall be held in the city, village or township in which is situated the place of business of the licensee. At the time and place appointed for such hearing the secretary or his assistants shall hear the parties to such complaint, shall have power to administer an oath, and shall enter in the office of the secretary of the Board of Agriculture at Topeka a decision either dismissing such complaint or specifying the facts which he deems established on such hearing and in case such facts are established as cause him to revoke such license, he shall bring an action on the bond within sixty days of the filing of such decision.

Sec. 5. Granting and revoking licenses. The secretary of the State Board of Agriculture may decline to grant a license or may revoke a license already granted where he is satisfied of the existence of the following cases or any of them: (*a*) Where a money judgment has been entered against such commission merchant and upon which execution has been returned unsatisfied. (*b*) Where false charges have been imposed for handling or services rendered. (*c*) Where there has been a failure to account promptly and properly or to make settlements, with intent to defraud. (*d*) Where there have been false statements as to conditions, quality, or quantity of goods received or held for sale on commission when the same might be known on reasonable inspection. (*e*) Where there has been false or misleading statement or statements as to market conditions with intent to deceive. (*f*) Where there has been a combination or combinations to fix prices. (*g*) Where the commission merchant directly or indirectly purchases the goods for his own account without prior authority therefor or without notifying the consignor thereof. (*h*) Where the commission merchant is in bankruptcy or in insolvency, or where the secretary of the State Board of Agri-
27 culture has reason to believe that bankruptcy or insolvency may shortly occur. (*i*) Where there has been a continued course of dealing of such nature as to satisfy the secretary of the inability to properly conduct the business of commission merchant or of intent to deceive or defraud shippers. (*j*) Where a licensee has been guilty of fraud or deception in obtaining his license. (*k*) Where a licensee neglects to file a new bond when notified by the secretary that the bond already filed is unsatisfactory.

Sec. 6. Certiorari to review. The action of the secretary of the State Board of Agriculture in refusing to grant a license, or in revoking a license granted under this article, shall be subject to review by a writ of certiorari, and if such proceedings are begun, until the final determination of the proceedings and all appeals therefrom, the license of such commission merchant shall be deemed to be in full force and effect; provided, the fee for such license shall have been paid and a bond given as herein required.

Sec. 7. Report of sale to consignor. Every commission merchant shall, upon the receipt of farm produce and as he handles and disposes of the same, make a record thereof, specifying the name and address of the consignor, the date of receipt, the kind and the quantity of such produce, the amount of goods sold, the date of sale, the price received, the name and address of the person to whom the goods are sold or his license number, where the same can be secured with reasonable diligence, and the items and expense connected therewith; and this record, together with payment in settlement for such shipment, shall be mailed to the consignor within forty-eight hours unless otherwise agreed. The commission merchant shall retain the foregoing record for a period of one year and the same shall be open to the inspection of the secretary of the State Board of Agriculture and of the consignor or the agents of either of them. The burden of proof shall be upon the commission merchant to prove

the correctness of his accounting as to any transactions which may be questioned.

Sec. 8. Offenses. Any person, firm, exchange, association, or corporation who shall receive or offer to receive, sell or offer to sell, on commission within this state any kind of farm produce without a license, except as in this chapter permitted, and any person who being a commission merchant in farm produce shall (*a*) impose false charges for handling or service in connection with farm produce, or (*b*) fails to account promptly and properly and to make settlements therefor, with intent to defraud, or (*c*) shall make false or misleading statement or statements as to market conditions with intent to deceive, or (*d*) enter into any combination or combinations to fix prices, or (*e*) directly or indirectly purchase for his or its own account goods received by him or it upon consignment without prior authority from the consignor, or shall fail to promptly notify
28 the consignor of such purchase on his or its own account, or (*f*) any person handling, shipping or selling farm products who shall make false statements as to grade, condition, markings, quality or quantity of goods shipped, or packed in any manner, with intent to deceive, or (*g*) shall fail to comply in every respect herewith, or (*h*) shall advertise or hold one's self out as a commission merchant in farm produce, without a license, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than ten dollars, nor more than five hundred dollars.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

Approved March 24, 1915.

Effect on Defendant's Business.

Defendant further answering alleges that the provisions, terms and requirements of said chapter 371 of the Laws of 1915 wrongfully and injuriously discriminate against the defendant and all other dealers in farm produce on commission in this county and state who receive, sell or offer for sale on commission within this state any kind of farm produce, and particularly the kinds of farm produce contemplated and covered by said alleged statute, and that said chapter 371 of the Laws of 1915 will operate, if enforced, to injure and in effect and in fact destroy the business of defendant and that of all other dealers who receive, sell or offer for sale said farm products on commission, and will make it impossible for defendant and all others similarly situated to continue in business in said state, because of the greatly increased cost and expense of what is known as "overhead expense" necessary to be incurred in complying with said law; that defendant has made a conservative and careful estimate of the average amount of business done by him for the past year in receiving, selling and offering for sale farm produce; that the business so done by him for the last year is about the average for his own and that of similar establishments, and that the net income from said business to defendant, and others similarly situated, is about — per year;

that in order to comply with said chapter 371 of the Laws of 1915, and particularly section 2 of the same, an additional expense of — per year would be incurred by defendant and others similarly situated, necessitating the expenditure of said sum for extra clerk hire, printing and other expenses incidental to comply with
29 and keeping the records required to be kept by said law, so that the enforcement and operation of said law would totally destroy the profits of defendant and others similarly situated, arising out of the business of receiving, selling or offering for sale farm produce on commission, and would greatly reduce, if not totally destroy, the profits heretofore derived from the business of defendant, as a whole; that while the business of defendant and others similarly situated as dealers in farm produce will be totally destroyed, said pretended law, if enforced, will greatly discriminate in favor of express companies handling said farm products within the state of Kansas, which companies defendant alleges do a very large business and interstate business in receiving, transferring and delivering all kinds of farm produce without being held to account by said alleged law, and in favor of great numbers of dealers and commission merchants resident in other states and particularly along the cities bordering on the state of Kansas, but which dealers are not amenable to said alleged law.

Not Within Police Power of State.

Defendant, further answering, alleges that the business of receiving, selling and offering for sale, on commission, farm produce as described in said alleged law is not a public business, nor one impressed with a public interest, but is a private business in the transaction of which any person engaging therein has the right to make and enter into such contracts as to him seem wise and expedient in securing and maintaining the patronage of his customers; that said business is in no respect different and possesses no greater interest and concern of the public than any other private business, and the enforcement and operation of said pretended law would be an unwarranted and unjust interference with and restriction of the private business of this defendant and others similarly situated; that section 7 of said pretended act is particularly offensive as an interference with the private business of defendant wherein it requires that the name and address of the person to whom goods are sold be mailed to the consignor of the farm produce received and sold, within 48 hours after the shipment; that the list of customers of defendant is an asset of great value to defendant in his business and that furnishing the list of names to the consignor will be in effect dis-
30 closing the source of his business so far as sales are concerned and enable his consignee and others to become his competitors; that if said consumers and other competitors who may have access to said names so required to be furnished desire they may, and as plaintiff verily believes will, use such information to injure him with his said customers and otherwise demoralize and destroy

the business with them which has been established by long association and fair dealing. And defendant further says that the matters attempted to be embraced in said chapter 371, and the regulations sought thereby to be imposed on plaintiff, and others engaged in said business, by the legislature of Kansas, are wholly without the power and authority of said state and its legislature, and are unreasonable, unlawful and arbitrary and not embraced within the police power of the state of Kansas, and not necessary to be exercised by said state or its legislature under its constitution or the constitution of the United States, to protect the peace, health, comfort or welfare of the people of said state, and that said pretended law by said pretended regulations on defendant's business and the business of others similarly situated with defendant denies defendant and others similarly situated the authority and right to conduct and manage their business and to enter into suitable contracts and protect legitimate business secrets necessary thereto, in violation of section 20 of the bill of rights of the constitution of Kansas reserving to citizens all powers not expressly delegated to the state by the constitution, and thereby denies to defendant the privileges and immunities of a citizen of the United States, deprives him of his property without due process of law and denies to him the equal protection of the laws of Kansas and the United States with those engaged in other businesses, and those engaged in receiving for sale and selling farm produce on commission, and otherwise, and not embraced within the regulations of said pretended law or those engaged in the sale of farm produce from outside of the state of Kansas by means of interstate commerce.

Title Insufficient.

Defendant, further answering, alleges that the title of said pretended law is defective and that the subject of said pretended act is not clearly expressed therein, and that said title does not furnish a clear index of or indicate the purpose of said act; that said
31 title refers generally to the sale of farm produce on commission but does not indicate the fact that an attempt is made to regulate the business of commission merchants, the method of the same, the collection of a tax or license fee or the fixing of penalties for its violation, and that said pretended title is therefore in violation of section 16, article 2 of the constitution of the state of Kansas, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title.

Confers Judicial Power.

Defendant, further answering, alleges that said pretended act imposes upon the secretary of the State Board of Agriculture and his assistants and employees the duty of carrying said law into effect; that the duties of said secretary and his assistants and employees are wholly ministerial, but that notwithstanding the character of the duties of these officers sections 4 and 5 of said pretended law attempt

to confer judicial powers upon said secretary of the State Board of Agriculture by establishing a tribunal judicial in its character to try alleged offenders against said law and punish them by depriving them of the right to continue in business or to receive any profits derived therefrom; and section 5 further empowers said secretary of the State Board of Agriculture to try and determine, as against alleged offenders against said pretended law, the validity of judgments against them, overcharges, fraud, misrepresentation, unlawful combination to fix prices, the bankruptcy of the alleged offender, or even suspected bankruptcy, and other similar alleged offenses, without allowing the person charged with said offenses his day in court or permitting any defense against the arbitrary action of the trial tribunal or mistakes or errors arising because of errors of law or fact or ignorance of the law; and defendant further says that said pretended act recognizing the judicial character of the duties of the secretary of the State Board of Agriculture and his assistants and employees attempts to provide in section 6 for a review of the judicial action and decision of said tribunal by the writ of certiorari, a writ heretofore abolished and now unknown to the practice and procedure of the courts in the state of Kansas, but that said section does not provide or direct what court or courts shall issue said writ, or what court or tribunal shall have jurisdiction to review
32 the evidence, findings or decision of the said secretary of the State Board of Agriculture and his assistants, and in that effect fails to furnish any right of appeal or revenue; that in thus conferring judicial powers upon said secretary of the State Board of Agriculture said pretended act is repugnant to article 3, section 1 of the constitution of the state of Kansas, which provides that the judicial power of his state shall be vested in the various courts therein enumerated, and in depriving alleged offenders against said law from making a defense, and having their day in court and right of appeal, as hereinbefore alleged, said alleged law violates section 18 of the bill of rights of the state of Kansas, in that defendant is denied a remedy by due course of law for injury to his property.

Confers Corporate Power.

Defendant, further answering, alleges that the Kansas State Board of Agriculture, the officers of which are charged with the administration of said section 371 of the Statutes of 1915, is a body corporate, duly created and incorporated by section 8134, of Dassler's General Statutes of Kansas of 1909, and succeeding sections; that the purpose of said section is there declared to be the improvement of agriculture and its kindred arts, and said body is there given power and authority to elect officers including a secretary; and defendant further alleges that the secretary of said Board of Agriculture is the executive officer of said body and that practically all of its administrative functions are performed and directed by said secretary; that since said section 371 was enacted, as defendant is advised, said secretary of the State Board of Agriculture has practically reorganized his force of assistants and employees for the purpose of administer-

ing said law and has at a great expenditure of time and money made preparations to enlarge and extend the powers, authority and duties of the Kansas State Board of Agriculture so as to include the administration and enforcement of said alleged law; that if said law is administered and enforced as contemplated by its terms, it will confer additional corporate powers upon the State Board of Agriculture and its officers and will result in a great amount of time and office room of the State Board of Agriculture and of the time and talent of its officers being diverted from the duties authorized by the act incorporating said board and require
33 them to be given to the administration and enforcement of said pretended law; that while section 2 of said pretended law provides that the license fees collected from commission merchants shall be turned into the state treasury, no part of said fees go to the state of Kansas, but the fund therefor belongs to and is for the use, exclusively, of the secretary of the State Board of Agriculture; that therefore said pretended law violates section 1, article 12, of the Statutes of the state of Kansas, which provides that the legislature shall pass no special act conferring corporate powers.

Discriminatory.

Defendant, further answering, says that notwithstanding the provisions of said act as applied to him and to others similarly situated, if said pretended law is enforced commission merchants and others in other states can and will sell, receive for sale and deliver said farm produce in Kansas in interstate trade, by express and by other cheap and convenient modes of transportation, and will thereby by means of ruinous competition and because of the extraordinary expense connected with the compliance with said law by this defendant and others similarly situated, produce a situation which will result in said act unfairly discriminating against defendant and his business and entirely destroy the same, and the profits theretofore incident thereto, and that said pretended act is a limitation upon interstate commerce, and denies to defendant the privilege of engaging therein, in violation of section 8 of article 2 of the constitution of the United States, which provides that "the Congress shall have power to regulate commerce * * * among the several states, and deprives defendant of his privileges without due process of law, and abridges and denies defendant of his privileges as a citizen of the United States and of the protection of the laws of Kansas and the United States, equally with those engaged in other business on commission, or otherwise, and in lines of business on commission not included within the terms of said chapter 371 of the Laws of 1915.

Penalties Excessive.

Defendant, futher answering, alleged that section 8 of said chapter 371 names eight different offenses which are declared to be a

misdemeanor and subject to a fine of from $10 to $500; that
34 in case any person, firm, exchange, association or corporation commits one of said offenses the punishment shall be as aforesaid, and defendant alleges that according to the terms of said section 8 an offender could and might violate all at the time and be subject to eight separate penalties at one time. Defendant is thereby denied, by reason of said law, any remedy in the due course of law for the injuries herein set forth resulting from said unconstitutional law to his business and property in violation of section 18 of the bill of rights of the state of Kansas, and is deprived of his property without due process of law, and is denied equal protection under the laws of the state of Kansas, and the United States, with those carrying on said lines of business and other businesses of like character not included within the terms of said chapter 371; and defendant further says that under section 7 of said alleged law an alleged offender is required to furnish evidence against himself and become a witness against himself contrary to section 10 of the bill of rights of the constitution of the state of Kansas.

Defendant, further answering, says that said alleged chapter 371 is void and unconstitutional in the respects heretofore set forth, and that if enforced will work great hardships and irreparable injury upon this defendant and others similarly situated, unless said law is declared and adjudged to be unconstitutional by this honorable court.

Wherefore, defendant prays this court to hold and determine said law to be unconstitutional and void, and for said reason this defendant and others similarly situated be held amendable to said constitution and law; that defendant have judgment for costs herein and for all other and proper relief.

35 *Affidavit of W. S. Payne.*

STATE OF KANSAS,
Sedgwick County, ss:

W. S. PAYNE, of lawful age, being duly sworn, upon his oath says that he is one of the above-named defendants, and is engaged, among other lines of business, in the business of receiving farm produce for sale upon commission, and selling and offering to sell such farm produce on commission in the city of Wichita, in the state of Kansas, and is what is known as a commission merchant; that the selling of farm produce on commission is only a part of his business, to wit, about twenty per cent of his business; that he has been so engaged in the city of Wichita, Kansas, for the period of twelve years; that in the opinion of affiant the enforcement, as to him, of chapter 371 of the Laws of Kansas of 1915 would work an irreparable injury and hardship in this, to wit: that the compliance of said law would divert a great deal of his time and attention from the main business, in order to take care of, account for and report the business of receiving and selling farm produce on commission as contemplated by said law; that it will necessitate the ad-

ditional clerk hire and overhead expense, which affiant compute and verily believes, in the sum of about $1000; that the total profit from that part of his business for the year ending January 1, 191 was about $600; that during the year 1915 he did a total gros business of about $35,000.

Affiant further says that in addition to himself there are a larg number of other persons and firms engaged in the same busines in the city of Wichita, and that the persons engaged in said bus ness in said city are persons situated similarly to himself as t the proportionate business done in receiving and selling farm pro uce; that the persons engaged in said business are among the mo industrious and best of business men of Wichita, in Sedgwick county and men of honor and integrity, and that to affiant's knowledg there has been no complaint from the general public or any oth person regarding the fairness, honesty and integrity of said me chants, except in rare and exceptional cases, such as would be mad against any person engaged in any other line of business; that a fiant is personally acquainted with each and every other perso engaged in said business in the city of Wichita, and knows the to compare favorably and equally in honesty and integrity and i character with any other merchants in the city of Wichita engage in any other line of business.

Further affiant saith not.

Said interveners have filed herein as an affidavit the followin statement verified by ten of said interveners (caption omitted):

36 First.

That said interveners are all engaged in the grain business an have their places of business at Wichita, Kan., and that they r ceive consignments of car lots of grain from country elevators, an that they sell such car lots for such country shippers on the ope market and charge a commission therefor. That they do not se grain on commission for other than grain dealers nor in le amounts than car lots.

Second.

That said interveners are by the terms of chapter 371 of the Law of Kansas of 1915 subject to its provisions.

Third.

That in their business of selling car lots of gain on consignmen from elevators and country dealers, such consignments are, by usag and custom, handled in this manner:

A country shipper desiring to have any one of these intervene sell a carload of grain for him sends to such intervener a bill o lading covering the shipment of the car desired to be sold, to whic bill of lading is attached a draft drawn by the consignor on suc intervener for the approximate value of the shipment. That suc

intervener is required to and does take up and pay such draft before he can come into possession of the wheat in order to sell same for the consignor. That the payment of such draft is in effect a payment in advance by such intervener to the shipper of the estimated sale price of the grain. That after the sale of such grain on the open market for the shipper, the intervener renders to his consignor an account sales showing the amount and quality of wheat sold, the name of the purchaser and a statement of the necessary charges incurred in making such sale, such as for weighing, inspecting and freight, including a commission of a sum per bushel which sum has theretofore been agreed upon by the shipper and the intervener. If the net proceeds of the sale of such grain exceed the sum previously advanced to the shipper by the payment of his draft, the intervener then accounts to the shipper for the balance due him. Or in case the net proceeds of the sale is less than the sum previously advanced to the shipper as aforesaid, such intervener then proceeds to endeavor to recover from the shipper the amount of his overdraft on such shipment.

37 The average advance made by these interveners to their consignors by payment of drafts as aforesaid exceeds the net avails of the sale of such consigned grain, and on the ordinary consignment these interveners overpay their consignors in advance.

The agricultural products of the soil sold by these interveners on commission as aforesaid are mostly wheat and corn, together with small amounts of oats and other grains. All of these grains are sold on weights and grades determined by weighers and inspectors legally appointed for such purpose, and these interveners have no possible control over the weighing and inspection of such grain. Consigned grain is ordinarily sold by these interveners on the floor of the Wichita board of trade by a sample taken from the cars so consigned by the state inspector who certifies as to the quality of such grain. The price of such grain is not determined by these interveners, but is determined by the world market, and the price at which grain is selling on a certain day at Wichita, Kansas City or Chicago is known to all shippers who consign grain to these interveners, from the daily market reports; and a country shipper who has had grain sold on commission for him by one of these interveners can himself tell from the official weights and grades furnished him and from the market reports for the day on which such grain is sold the value of the grain so sold, it being impossible for these interveners to practice fraud or deceit upon their consignors as to price received for grain, as might be the case where the quality, quantity and price received by commission dealers for consigned goods was known only to such commission dealers. The quality and quantity of grain consigned as aforesaid is or can be known to such consignors before shipment.

That these interveners are not operators of public elevators, nor do they sell grain on consignment for a commission, except for grain dealers with whom they have previously made arrangements to so sell. That the reason and purpose of the sale of grain on commission as aforesaid is this: A country elevator having five thousand

bushels of wheat to sell can, at his option, sell it direct to the ultimate consumer, a mill, or to a grain dealer like one of these interveners at a fixed price by bargain and trade, or if he must ship his grain in order to make room for other grain or to realize money
38 thereon at once, and he believes that the price of grain will be higher a few days later, he then consigns his grain to one doing business as do these interveners, to be sold on arrival, the shipper getting his money out of said grain at once by discounting his drafts attached to bills of lading, but the shipper hoping and believing that the price of grain will raise before his grain can be sold on the market. It is a recognized fact or phenomena of the grain business that country shippers sell their grain outright on a bearish market, but consign it for later sale on a bullish market. There is never a work day of the year in Kansas when a grain dealer can not sell his grain outright for cash on the open market on official weights and grades at the current and established and well known market price of that day.

The business relations of these interveners with their consignors as aforesaid is contractual and entered into at the pleasure of such consignors, and grain is consigned to these interveners to be sold for their consignors not through necessity, but because the consignor, in his judgment, believes that he might obtain more money for his grain by such procedure than by outright sale. Neither usage, law or necessity compels any one to have grain sold by these interveners on commission.

These interveners are all engaged in the same business, to wit, the grain business, and all sell grain on consignment for a commission, they making their livelihood in part at least from the commissions paid for such sales. The amount of the commissions charged by them for selling grain on consignment is agreed upon in advance between the shippers and themselves, and in all instances is based on a certain price per bushel or unit.

The method used by these interveners in handling grain on consignment is exactly the same as the method used in buying similar grain from the same shippers as to payment of drafts, sale by official weights and grades, rendition of account sales, etc., the only difference between the two methods being that in grain sold on consignment the shipper can not know the market price that he will receive for his grain until it is actually offered and sold on the open market, and the commission dealer does know how much per bushel he will make for making the sale, while in an outright sale made for
39 instance by the same shipper to the same intervener the shipper knows in advance exactly how much he will receive for his grain, and the intervener does not know until later what if any profit he will make on handling such grain. On consigned grain the shipper takes the chances of the market, and on grain sold outright the intervener takes the chances of the market, there being absolutely no other difference between the methods of selling grain.

Fourth.

That the interveners are all members of the Wichita Board of Trade, which organization controls the business conduct of its members in the handling of the grain business as aforesaid, and as such members these interveners are required to be and are of financial and moral responsibility.

Fifth.

That commission dealers who receive cattle from the country to be sold at the stockyards and markets of the state for the shipper for a commission handle their commission business in practically the same manner as do these interveners, except that it is not the custom of such cattle commission men to make advances to the shipper on the expected sale price of such cattle. That the large part of such cattle commission dealers' business is the selling of cattle and stock for the farmers and stock men themselves, the producers, while these interveners in no instance deal with producers of grain, but their business relations are entirely with other grain dealers.

Sixth.

It is a fact that the commission dealers included within the terms of the law in question are the only persons engaged in private and nonofficial business in Kansas who are required by law to put up bonds for the payment of their debts.

Seventh.

These interveners, and others selling grain in like manner on commission, neither buy nor sell to the public at large, their business being solely with other grain dealers and with mills, solely with such parties with whom they have previously contracted to do such business.

40–43

Eighth.

A large part of the grain handled by these interveners for sale on commission is consigned to them by dealers located in Oklahoma, and there is no law in Oklahoma, similar to the one in question, which requires the licensing and bonding of the commission dealers of Oklahoma.

A large part of the grain raised in Kansas, which is sold for dealers by commission men, is consigned by Kansas dealers to commission men located at Kansas City, Mo., which competitors of these interveners are not required to be licensed and bonded as are these interveners.

Ninth.

There is no general law in Kansas making it a misdemeanor for any person to enter into any combination or combinations to fix prices, or to make false or misleading statements or statements as to market conditions with intent to deceive, except as such subject is covered in the law in question.

Tenth.

No one of these interveners ever heard or knew, prior to the passage of the act in question of any demand or insistence for the enactment of a law licensing and bonding those who receive and sell grain on commission, or heard or knew of any dissatisfaction or complaint on the part of their consignors as to their methods of handling grain on consignment.

The foregoing is a true and correct abstract of the record in the above-entitled case.

S. M. BREWSTER,
Attorney-General, Attorney for Plaintiff.

* * * * * * *

44 In the Supreme Court of the State of Kansas, Monday, June 26, 1916.

No. 20234.

THE STATE OF KANSAS ex Rel. S. M. BREWSTER, Att'y Gen., Plaintiff,

vs.

J. C. MOHLER, as Sec. of State Board of Agriculture of the State of Kansas, Defendant.

Journal Entry of Judgment.

This cause comes on for decision; thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendants, and that the writ of mandamus issue to the defendant J. C. Mohler, as Secretary of the State Board of Agriculture of the the State of Kansas, fees paid him for licenses as required by Section 2, Chap. 371 of the laws of 1915. It is further ordered that the cotss of this proceeding be paid by W. S. Payne one of the defendants, taxed at $—, and hereof let execution issue.

45 And afterwards and on the 29th day of June 1916, there was filed in the office of the Clerk of the Supreme Court, the written opinion of the Supreme Court of the State of Kansas,

together with a Syllabus, which Syllabus and opinion are in the words and figures as follows to-wit:

46 No. 20234.

THE STATE OF KANSAS ex Rel. S. M. BREWSTER, Attorney General, Plaintiff,

v.

J. C. MOHLER, as Secretary of the State Board of Agriculture, et al., Defendants.

Original Proceeding in Mandamus.

Writ Allowed.

Syllabus by the Court.

DAWSON, *J.:*

1. Chapter 371 of the Laws of 1915 which requires all commission merchants who sell farm produce for resale to hold a license issued by the Secretary of the State Board of Agriculture and to give bond to insure fair dealing with their consignors is not unconstitutional as discriminatory or class legislation.

2. An act which requires commission merchants to make and furnish to the consignors of goods entrusted to them for sale on commission an accurate and detailed account of all the pertinent facts relating to such sales on commission is a valid exercise of the state's police power and the expense of making such a record and account is a proper charge upon the business and not confiscatory.

3. The powers of granting and withholding or revoking licenses to commission merchants, of supervising their dealings with their consignors, of examining their solvency, and of exacting from them bonds to insure their faithful accounting and payment for goods consigned to them are administrative and not judicial.

47 4. Chapter 371 of the Laws of 1915 confers no corporate powers on the State Board of Agriculture.

5. Chapter 371 of the Laws of 1915 is not invalid as an undue interference with interstate commerce.

6. An act of the legislature regulating intrastate commerce is not invalid because competitive interstate commerce in the same territory is not similarly regulated by the federal government.

7. Chapter 371 of the Laws of 1915 entitled "An act in relation to the sale of farm produce on commission," contains only one subject. That subject is clearly expressed in its title, and the act is subject to no infirmity as special legislation.

8. The penalties prescribed for violations of the act, (*a*) revocation of license for various relevant delinquencies, and (*b*) fines of from $10 to $500 for misdemeanors defined therein are not excessive or unusual.

9. The legislature has full power to provide for a judicial review of the acts of an administrative officer, and to prescribe the proce-

dure for such review. The writ of certiorari and its statutory adaptation to a review of the official acts of the Secretary of the State Board of Agriculture, under Chapter 371 of the Laws of 1915, violates no constitutional principle.

Johnston, C. J., Burch, J., Mason, J., Porter, J. and West, J., concurring.

Marshall, J., dissenting.

A true copy.

Attest:

____ ____,
Clerk Supreme Court.

48 No. 20234.

The opinion of the court was delivered by

DAWSON, *J.*:

This action is brought to test the validity of chapter 371 of the Laws of 1915, entitled "An act in relation to the sale of farm products on commission." The state asks for a writ of mandamus to compel the Secretary of the State Board of Agriculture to pay into the state treasury certain license fees which he has received from certain commission merchants, paid by them under protest and under coercion of the act.

The Secretary answers that he is ready and willing to execute this law and to pay over the fees when assured that he will incur no personal liability in so doing, and he asks that the parties interested in the fees paid under protest be brought into court that the whole controversy be fully adjudicated.

W. S. Payne, a commission merchant of Wichita who has paid his license fee under protest, was impleaded and answered setting up many constitutional objections to the act. Some thirty grain dealers of Wichita who receive consignments of grain from country elevators and sell the same on commission intervene and likewise challenge the constitutionality of the act.

The act under consideration provides that all persons who sell farm products on commission, except sales to the ultimate consumer, must have a license issued by the Secretary of the State Board of Agriculture. The license costs ten dollars and is effective for one year subject to revocation by the Secretary after investigation for unfair or improper business dealings. A judicial review of the acts of the Secretary is provided. The licensee must give a bond to insure his fair dealing with his consignors. The Secretary may maintain an action on this bond in a proper case. Every commission merchant must keep a complete record of all consignments received and sold by him, with the name of the consignor, date of receipt, kind

and quality of the consignment, the price received, name and
49 address of person to whom the goods are sold, and the items of expense, and this record must be forwarded to the consignor within forty-eight hours after the transaction unless otherwise agreed. Such a record shall also be kept by the commission merchant for one year, and shall be open to the inspection of the consignor and the Secretary of the State Board of Agriculture or their agents.

Certain relevant offenses are defined by the act, all designed to standardize the business of commission merchants in consonance with honesty and fair dealing.

The chief objections to the act may be thus summarized:

(*a*) The act is meddlesome, discriminatory and class legislation, and so burdensome that it will confiscate and destroy an honorable, useful and legitimate private business; (*b*) it confers judicial power on an administrative functionary; (*c*) it confers corporate power on the State Board of Agriculture; (*d*) it interferes with interstate commerce or unjustly burdens domestic commerce; (*e*) the title is defective and the act contains two subjects; (*f*) the act is special; (*g*) the judicial review is anomalous; and (*h*) the penalties are excessive.

Examining these points in order, the act is to be justified, if at all, as exercise of the state's police power. It is sometimes contended that the state cannot regulate private business, and that unless the business is one of public concern it is exempt from legislative interference. Probably this notion is due to the fact that the modern American state has hitherto left private business largely to its own devices, and because the state in recent years has largely concerned itself with the regulation of business as to which the public's interest was undeniable. Hence the elaborate statutes regulating public service corporations. But there can be no doubt that the state's police power may extend to private business. Our statutes relating to registration of deeds and mortgages, the statute of frauds, the mechanic's lien law, and the like are illustrations of the exercise of the
50 state's police power over private business. It is also true that business which has heretofore been considered to be private may by changes and progress in the methods of its conduct be transformed into a public or quasi-public business, and this may make it desirable and even imperative that the state concern itself in its regulation and control. Of course such regulations must be reasonable, but if they are reasonable they must be obeyed.

The business of commission merchants dealing in farm produce has grown to be one of great volume and much importance. In its development its tendency seems to be to centralize in the larger cities far removed from the points of origin, and where by no practical possibility can the originators of the traffic, the consignors, keep personal check on the doings of the commission merchants who are merely the agents of the consignors. Such a situation would seem to warrant a reasonable extension of the state's governmental power over the business.

The act does classify commission merchants, but the classification is reasonable. It relates to all who sell farm produce on commission for resale, and this includes "agricultural, horticultural, vegetable and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts and honey," but not timber, floricultural products, tea or coffee. It practically reaches all the important and useful products of farm and truck garden. It specifically exempts matters of little consequence to the Kansas producer. If, as argued, it also exempts live stock, that too, is a reasonable exemption since live stock is almost invariably shipped in carloads and is so valuable as to justify the producer or shipper in the expense of accompanying his shipment to market and personally supervising the fidelity of the commission merchant who makes the sale for him or in making the sale himself. As modern business is now conducted, it is practically impossible for the ordinary farmer or fruit producer or truck gardener to market his own products without the agency of the commission merchant.

51 Nor do the exactions of the statute seem unduly burdensome. It exacts a license of $10 per annum. That fee is not onerous. It requires a bond to insure the commission merchant's fidelity and the payment of his obligations. This is in accord with the general tendency of modern business, relieve it from the uncertainty of fraud or insolvency. It requires the merchant to account and report promptly and completely to the consignor. Perhaps this has always been the law, for what is the relation of consignor and commission merchant but that of principal and agent, and what is this statutory requirement to account and report but the common law duty of faithful and full disclosure to his principal of all the agent's doings? Illustrations are submitted in affidavits showing how onerous, burdensome, and expensive it would be to make a detailed account of the sales of a commission merchant. Thus a barrel of garlic is usually sold in small quantities, the remainder being kept in cold storage until called for. A carload of onions containing 470 crates is disposed of by the commission merchant to perhaps four hundred different retail merchants. A barrel of radishes is usually sold in bunches of a few dozen. Many such illustrations are given, and while they do show that a strict compliance with the act will necessitate a good deal of bookkeeping, we cannot but marvel how commission merchants have kept track of all these details hitherto. Probably the legislature was convinced that they did not keep accurate accounts of these innumerable transactions—not through wilful broach of faith—but because it was not humanly possible for a man's memory to stand such a strain, and hence the legislative determination that the memory method, or whatever method it was, should be superseded by an accurate and detailed system of accounting. If this occasions an added expense to the business, the traffic will have to bear it.

The supreme court of Minnesota in a well-considered case upheld a similar statute for the licensing and bonding of com-
52 mission merchants who sold agricultural products and farm produce. (State ex rel. Beek v. Wagener, 77 Minn. 483, 80

N. W. 633, 788, 1134, 46 L. R. A. 442.) In Hawthorn et al. v. The People, 109 Ill. 302, 50 Am. Rep. 610, the supreme court of Illinois upheld a statute requiring operators of butter and cheese factories on the co-operative plan to give bonds for faithful accounting of property for manufacture. In that case the court said:

"It is true the act does require the manufacturer, at the end of each month, 'to make, acknowledge, subscribe and swear to a report, in writing, showing the amount of products manufactured, the amount sold, the prices received therefor, and the dividends earned and declared for the third month preceding the month in which the report is made,' and to file a copy of the same with the clerk of the town or precinct in which the factory is located. This, in terms, falls far short of a conflict, in terms, with that constitutional provision [Illinois Bill of Rights] nor does it conflict in spirit. * * * This is not an unusual exercise of power. It has always been required that executors and administrators intrusted with the property of estates shall file in a public office a full and complete account of their actions with reference to the property thus intrusted to their management and control. This law only requires the manufacturer to render an account of his management of other people's property. He holds himself out as a factor for the management and sale of other people's property, and in that respect is like a public warehouseman. * * *

"It is urged that this is an unheard of species of legislation—that the past has furnished no precedent for the law. If this should be conceded to be true, that would not of itself render the law unconstitutional. Government was organized, and is supported, to afford protection to the governed against wrong and oppression, and in its organization ample power was conferred on the legislative branch to afford such protection. That branch of the government holds so to speak, a vast reservoir of legislative power never yet exercised, because the exigencies have not arisen requiring it to be exerted; but with our wonderful increase of population, advancing civilization,, and increase and complication of business, that reserved power will certainly be called into action. The Constitution has not limited the exercise of legislative power to such enactments as have hitherto been passed. To so hold would be to embarrass good government, and would prove highly injurious, if not destructive.

"But it is insisted that it restrains and embarrasses business. If that were conceded to be true, what provision of the Constitution forbid the legislature from exercising the power? We are aware of none. Most, if not all, of the States in the Union have required that persons in almost every species of business should procure and pay for a license to enable them to pursue the calling. Nor so far as we are aware, has the constitutionality of such laws ever been questioned. They were undeniably a regulation, if not a restraint on trade, and yet the power was clearly legislative, and properly exercised" (pp. 307-310).

A similar act, known as the Commission Merchants' Law, was

upheld by the supreme court of Washington in State v. Bowen & Co., 86 Wash. 23, 149 Pac. 330, and the discussion of the principle upon which such legislation is justified is logical and convincing; although in a later case, State v. J. B. Powles & Co., — Wash., —, 155 Pac. 774, the court was constrained to hold the act void because of indefiniteness as to the term "commission merchant," an infirmity which does not exist in the Kansas act.

The case of People v. Berrien Circuit Judge, 124 Mich. 664, 83 N. W. 594, is pressed on our attention, where an act of the same nature requiring a bond for $5,000 to insure the fidelity of commission merchants selling farm and garden and dairy products
54 and live stock on commission was declared to be unconstitutional. Whatever that great court says is always read and studied with profit, but curiously enough, in that case, the particular clause or clauses of the constitution, state or federal, which the statute was held to infringe are not cited nor even hinted at. The case does not cite a single precedent of any sort; and it neither persuades nor convinces as do the decisions of the supreme courts of Minnesota-Illinois and Washington on this subject.

See, also, Freund Police Power, §§ 296, 297.

Does the act confer judicial power on the Secretary of the State Board of Agriculture? Judicial power is the power to hear, consider and determine controversies between rival litigants as to their personal or property rights and must be regularly invoked at the instigation of one of the litigants. (See definitions in 4 Words and Phrases, 3860.) The act of 1915 does not pretend to confer such power on the Secretary of the State Board of Agriculture. It merely confers upon him administrative power such as has become common in this state. The state charter board is given similar power to grant or withhold a charter for a bank. (Schaake v. Dolley, 85 Kan. 598, 118 Pac. 80.) The insurance commissioner is authorized to grant, withhold and revoke licenses to transact insurance business in Kansas. The Public Utilities Commission is authorized to grant or deny permits to conduct a public service business. The State Board of Medical Registration and Examination is authorized to grant, deny or revoke licenses to practice medicine. (Meffert v. Medical Board, 66 Kan. 710, 72 Pac. 247.) The exercise of such power is merely the exercise of administrative discretion. If this power is abused, the courts are open to the aggrieved party, if not by some statutory review then by the extraordinary and prerogative remedies of injunction or mandamus. And by no course of reasoning can a distinction be made between the licensing and other administrative powers conferred by this act upon the Secretary of the Board of Agriculture and the similar broad and valid powers conferred upon the many other official boards and functionaries
55 with which the state has provided itself for the proper and effective conduct of its governmental business.

Neither does the act confer corporate power upon the Board of Agriculture. Indeed the act confers no power of any sort upon that board. The state patronizes that board as one of its principal

educational agencies for the benefit and improvement of the principal business of the commonwealth—agriculture; and it has determined, happily we think, to select the chief functionary of that board to administer this act which so closely touches the chief industry of the state. We think it unnecessary to trace the legislative history of the creation and development of the State Board of Agriculture, and deem it sufficient to say that it is not a corporation like a railroad or a dry goods company nor like a municipal corporation, nor do we find any grant of corporate powers to it or to its Secretary in this act.

The question concerning this act's interference with interstate commerce might well be left until some specific difficulty concerning such commerce arises, for it is familiar law that no act is ever declared to be unconstitutional except where the party challenging it is directly affected and prejudiced by some specific invasion of his constitutional rights. A commission merchant's business is that of a warehouseman and sales agent. As a warehouseman, his business is subject to state control notwithstanding the goods which he handled may be commodities of interstate commerce. (Munn v. Illinois, 94 U. S. 113.) As a sales agent, the commission merchant is subject to state control although the commodities sold by him may be of an interstate character. (Hopkins v. United States, 171 U. S. 578; W. W. Cargill Co. v. Minn., 180 U. S. 452.) Even if it were held that the act of 1915 did not or could not apply to interstate commerce, the state's power over domestic or intrastate commerce is supreme. Certain it is that the federal government may not meddle with purely intrastate business, and it would hardly do to say that
56 where there is a domestic business and interstate business of the same nature the state may not regulate the domestic business because the federal government does not likewise and similarly regulate the competitive interstate business in the same territory. To admit that would be an end of all state government. The point sought to be made is merely one of the inconveniences of our dual form of government, sufficiently compensated however by the innumerable benefits which we nevertheless enjoy under our complicated governmental system. Sad indeed would be the situation of a poor truck gardener of the Kaw Valley if he might not apply to some state or local official but only to some bureau in far-off Washington, D. C., to learn whether John Doe was a licensed and trustworthy commission merchant to whom he might entrust his little stock of garlic and radishes for resale, or for summary aid in bringing a recalcitrant commission merchant to a sense of his duty.

Some other objections to the act need no discussion. The act relates to the sale of farm produce on commission. It relates to nothing else. This is one subject and the title is fairly and sufficiently indicative of its subject matter. The act is not special. It is a general act and the classification of commission merchants brought under its terms is logical and reasonable. The penalties are not excessive. Indeed, there is some ground for the fear that the mild and modest penalties prescribed by the act may supersede and repeal by implica-

tion some of the state's older and more powerful and drastic statutes for the suppression of unfair trade practices. However that may be, the objection to the penalties cannot be sustained.

One more question should be noticed. Section 6 of the act reads:

"Certiorari to review. The action of the secretary of the State Board of Agriculture in refusing to grant a license, or in revoking a license granted under this article, shall be subject to review
57 by a writ of certiorari, and if such proceedings are begun, until the final determination the proceedings and all appeals therefrom, the license of such commission merchant shall be deemed to be in full force and effect; provided, the fee for such license shall have been paid and a bond given as herein required."

The remedy by certiorari is criticised as being unknown to our practice. The writ of certiorari was abolished in 1868. (Gen. Stat. 1901, §5050; Gen. Stat. 1868, ch. 80, §564.) It was a writ well-known to the common law. It issued out of some superior court having the full judicial power of the state directing some inferior court to certify and transmit to it the records and proceedings of a particular case for trial or correction of errors. It is still used in the federal courts and in the older states. But our legislature which abolished the writ in 1868 had undoubted power to reestablish it in 1915. The name and style of the writ is unimportant. Long ago this court, in conformity to the temper of this state, established the doctrine that the substance and not the form of things is the chief object in the administration of justice. Moreover, an examination of the law of other states will show that the modern notice of certiorari is not confined to a judicial examination or review of a certified case from a lower court. It is used to effectuate a judicial review or give a judicial right of action from the acts or proceedings of any inferior tribunal—not necessarily from an inferior court. (6 Cyc. 740, and note 10; 6 Cyc. 752.) This last citation appends a valuable note:

"The writ will lie to review the action of a town board in removing an assessor (Merrick v. Arbela, 41 Mich. 630, 2 N. W. 922); of a health board in refusing to register births as required by statute (Matter of Lauterjung, 48 N. Y. Super. Ct. 308); of a board of supervisors in directing an election to relocate a county seat (Herrick v. Carpenter, 54 Iowa 340, 6 N. W. 574); in creating an office and increasing the salaries fixed by statute (Robinson v. Sacra-
58 mento, 16 Cal. 208); or to set aside any wrongful, illegal, or fraudulent appropriation of public moneys (Shields v. Paterson, 55 N. J. L. 495, 27 Atl. 803 [followed in Shields v. Grear, 55 N. J. L. 503, 27 Atl. 807]); of a city council in removing a city officer (Macon v. Shaw, 16 Ga. 172); granting a ferry license (Fay, Petitioner, 15 Pick. (Mass.) 243); or to test the lawfulness of a municipal ordinance providing for the payment of an official salary (Christie v. Bayonne, 64 N. J. L. 191, 44 Atl. 887); and of school trustees in uniting and dividing school districts (Miller v. School Trustees, 88 Ill. 26; State v. Whitford, 54 Wis. 150, 11 N. W. 424); but it has been refused to boards of election (Ex. p. Carson, 5 S. C.

117), and of road commissioners (Nobles v. Piollet, 16 Pac. Super. Ct. 386) because they were not inferior courts."

In Crawford v. Scio and Webster, 22 Mich. 405, a writ of certiorari was issued "to bring up for review the proceedings of the boards of the two townships, sitting as a single joint board upon a petition presented to them for the removal of one Crawford from the office of director of a school district which embraced part of each township." We only cite this case to show how the uses of certiorari have been enlarged in its progress from the land and time of Lord Coke to the land and time of Judge Cooley.

It will thus be seen that in practical operation in modern times, either by statute or by judicial enlargement of its use, certiorari will lie not alone to an inferior court but to statutory boards and officers. And surely the legislature which has full power to prescribe jurisdiction and procedure may grant a judicial review or a cause of action from the acts of the Secretary of the State Board of Agriculture and in so doing the legislature may label that review or cause of action certiorari or give it any other convenient name. In Wilson v. Price-Raid Aud. Com., 31 Kan. 257, 259, 1 Pac. 587, this court said:

59 "The jurisdiction of the supreme court is much more limited by the constitution than that of the district court; for under the constitution, the legislature can confer upon the district court all the original and all the appellate jurisdiction which it may choose. (Const., art. 3, § 6.) It may confer upon the district court jurisdiction in any matters of a judicial character, without reference to where such matters may originate; for if the district court does not take jurisdiction of such matters under or by virtue of its appellate jurisdiction, it may take jurisdiction of the same under or by virtue of its original jurisdiction. Any matter judicial in its character can be taken from even a road overseer to the district court, provided the statute authorize the same; for when the matter gets into the district court the district court can exercise jurisdiction over it as a court of original jurisdiction."

What court may issue the writ? The district court to be sure. That is our only court of general jurisdiction. It holds practically all the judicial power of the state. It was no more necessary for the statute to designate the court from which the writ might issue than it is in any other regulatory or penal law or in any other act giving statutory rights of legal redress.

It will thus be seen that whatever may be the demerits of the act, it is free from constitutional infirmities and must stand as a valid statute. As such it should be respected and enforced, and the state is entitled to judgment.

The writ is allowed.

Johnston, C. J., Burch, J., Mason, J., Porter, J. and West, J., concurring.

60 MARSHALL, J. (dissenting):

I dissent from the ninth paragraph of the syllabus and the corresponding portion of the opinion. The duties placed on the secre-

tary of the board of agriculture by the act in question are administrative. A writ of certiorari from any court to the secretary will transfer the proceedings before him to the court granting the writ. When these proceedings reach the court they will then be presented to the court in the same manner in which they were presented to the secretary. If the proceedings were administrative before the secretary, they will continue to be administrative before the court. In certiorari there is continuity of proceedings from the time they are instituted before the subordinate tribunal or official until they are finally determined in court. The court can not determine administrative matters, and for that reason will be without jurisdiction. In 5 R. C. L. 258, the author says:

"The courts are unanimous in holding that the writ of certiorari will lie to review only those acts which are judicial or quasi judicial in their nature."

If the proceedings are judicial when certified to the court on certiorari, they must have been judicial before the secretary, and the secretary was without authority to entertain them.

Without section 6, the act remains a complete and systematic whole, and can be administered according to its every intent and purpose; and any person injured by any act of the secretary has a right of action in any court of competent jurisdiction. But new proceedings must be commenced. Those before the secretary have ended. Those in the court are separate and apart from those before the secretary. The secretary would act in his administrative capacity. The courts would act in their judicial capacity.

61–99 Since the decision in The State v. Johnson, 61 Kan. 803, 60 Pac. 1068, this court has adhered to the principle that under our constitution there is as complete a separation of legislative, executive and judicial powers of the government as is possible. In my judgment, section 6 of the act violates that principle.

A true copy.

Attest:

____ ____,
Clerk Supreme Court.

* * * * * * *

100 In the Supreme Court of the State of Kansas.

No. 20234.

THE STATE OF KANSAS ex Rel. S. M. BREWSTER, Attorney General, Plaintiff,

v.

J. C. MOHLER, as Secretary of the State Board of Agriculture of the State of Kansas, and W. S. Payne, Defendants; L. H. Powell and Thirty Others, Interveners.

Assignment of Errors.

Come now W. S. Payne, defendant, and L. H. Powell and thirty others, interveners, in the above styled Court and cause, and com-

plain that in the record, proceedings and final order and judgment of the Supreme Court of Kansas, entered on the 29" day of July 1916, there is manifest error in this, towit:

1. That the Supreme Court of the State of Kansas erred in allowing a writ of mandamus directed to J. C. Mohler as secretary of the State Board of Agriculture of the State of Kansas, commanding him to pay into the state treasury the sum of ten dollars paid to him by W. S. Payne under protest, and all other fees that have heretofore or may hereafter be paid to him, as fees for licenses to do business as commission merchants within the state of Kansas, pursuant to chapter 371 of the Laws of Kansas of 1915.

2. That the Supreme Court of the State of Kansas erred in finding and adjudging that chapter 371 of the Laws of Kansas of 1915 is not unconstitutional and is a valid statute of the State of Kansas.

3. That the Supreme Court of the State of Kansas erred in finding and adjudging that the causes shown by W. S. Payne, defendant, and L. H. Powell and thirty others, interveners, why the provisions of chapter 371 of the Laws of Kansas of 1915, should not be enforced by defendant J. C. Mohler, as Secretary of the State Board of Agriculture of the State of Kansas, are not good.

4. That the Supreme Court of the State of Kansas erred
101 in adjudging and finding that Chapter 371 of the laws of Kansas of 1915, being entitled "An Act in Relation to the Sale of Farm Produce on Commission" does not deprive citizens of the United States and of the State of Kansas, and defendant W. S. Payne, and the interveners herein, of their right to conduct their lawful businesses without interference, and is not violative of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Kansas erred in deciding and adjudging that chapter 371 of the Laws of Kansas of 1915 does not discriminate against defendant W. S. Payne and these interveners and in favor of other citizens of the State of Kansas of the same class and does not deny to said defendant and interveners and to citizens of the United States and of the State of Kansas the equal protection of the law, and is not violative of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of the State of Kansas erred in deciding and adjudging that chapter 371 of the Laws of Kansas of 1915 does not deprive citizens of the State of Kansas and of the United States and these interveners and defendant W. S. Payne of their property and property rights without due process of law, and is not violative of the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of the State of Kansas erred in deciding and adjudging that the powers of granting and withholding or revoking licenses to commission merchants, of supervising their dealings with their consignors, of examining their solvency, of suing on bonds, and of exacting from them bonds to insure their faithful accounting and payment for goods consigned to them, conferred on the Secretary of the State Board of Agriculture by chapter 371 of

the Laws of Kansas of 1915, are administrative and not judicial.

8. The Supreme Court of the State of Kansas erred in deciding and adjudging that the police power of the state may extend to private business, and that private business may be regulated by the state although private business is not of public concern and does not affect the public health, welfare or morals.

9. The Supreme Court of the State of Kansas erred in
102 ruling and adjudging that chapter 371 of the laws of Kansas of 1915 does not interfere with interstate commerce and that the rights, privileges and immunities of defendant W. S. Payne and L. H. Powell and thirty other interveners claimed and set up under the laws of the United States relative to interstate commerce are not interfered with.

10. The Supreme Court of the State of Kansas erred in adjudging and deciding that the legislature of the State of Kansas has full power to provide, in an act entitled "An Act in Relation to the Sale of Farm Produce on Commission" for a judicial review of the acts of an administrative officer, by the writ of certiorari, such writ having been abolished in the State of Kansas, and that the special provision of chapter 371 of the Laws of Kansas of 1915, providing for a judicial review of the acts of the Secretary of the State Board of Agriculture of the State of Kansas, an administrative officer, by writ of certiorari, which writ has been abolished in Kansas, violates no constitutional provision.

11. The Supreme Court of the State of Kansas erred in deciding and adjudging that chapter 371 of the Laws of Kansas of 1915 which relates to the sale of farm produce on commission, including "agricultural, horticultural, vegetable and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts and honey" but not timber, floricultural products, tea or coffe, makes a reasonable classification of commission merchants, because "it practically reaches all the important and useful products of farm and truck garden' though it does not relate to the sale of cattle on commission, and in adjudging that such classification is not violative of the Fourteenth Amendment to the Constitution of the United States.

12. The Supreme Court of the State of Kansas erred in adjudging that chapter 371 of the Laws of Kansas of 1915 is free from constitutional infirmities and should be respected and enforced and that the State is entitled to judgment in this action.

Wherefore your petitioners pray that the judgment and decision of the Supreme Court of the State of Kansas may be reversed, set aside and held for naught, and that your petitioners may be restored to all things which they have lost by reason thereof.

CAMPBELL & CAMPBELL,
Attorneys for W. S. Payne, Defendant;
L. H. Powell and 30 Others, Interveners.

103–110 [Endorsed:] No. 20234. The State of Kansas ex rel. —,. Plaintiff, v. J. C. Mohler, as Secretary; W. S. Payne, Defendants; L. H. Powell et al., Interveners. Assignment of Errors.

Filed Aug. 3, 1916. D. A. Valentine, Clerk Supreme Court. Campbell & Campbell, Attorneys at Law, Wichita, Kansas.

* * * * * * *

111 In the Supreme Court of the United States.

W. S. PAYNE et al., Plaintiffs in Error,
vs.
THE STATE OF KANSAS ex Rel. S. M. BREWSTER, Attorney-General, Defendant in Error.

To the Clerk of said Court:

The Plaintiffs in Error intend to rely on the errors set forth in the assignment of errors contained in the typewritten transcript of record.

Plaintiffs in Error think it necessary to print only the following parts of the record:

That part of the abstract of record used before the Supreme Court of the State of Kansas which has been transmitted to this Court, the opinion of the Supreme Court of Kansas and the assignment of errors upon which the case brought to this Court, said parts of the record being sufficient for the consideration of the questions which Plaintiffs in Error desire to present to the Court.

RAY CAMPBELL,
J. G. CAMPBELL,
Attorneys for Plaintiffs in Error.

We hereby acknowledge service of a copy of the above Statement and Notice this 29 day of August, 1916.

S. M. BREWSTER,
Att'y Gen.,
J. P. COLEMAN,
Ass't Att'y Gen.,
Attorneys for Defendant in Error.

[Endorsed:] 739/25, 569.

112 [Endorsed:] File No. 25,569. Supreme Court U. S., October Term, 1916. Term No. 739. W. S. Payne et al., Pl'tffs in Error, vs. The State of Kansas ex rel. S. M. Brewster, Attorney General. Statement of errors to be relied upon and designation by plaintiffs in error of parts of record to be printed, and proof of service of same. Filed October 23, 1916.

Endorsed on cover: File No. 25,569. Kansas Supreme Court. Term No. 739. W. S. Payne, L. H. Powell, et al., plaintiffs in error, vs. The State of Kansas ex rel. S. M. Brewster, Attorney General. Filed October 23d, 1916. File No. 25,569.

In The
Supreme Court of the United States

October term, 1916

No. 739 [redacted]49

W. S. PAYNE, L. H. POWELL, ET AL.,
PLAINTIFFS IN ERROR
VS.
THE STATE OF KANSAS EX REL. S. M. BREWSTER,
ATTORNEY GENERAL

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Brief and Argument of Plaintiffs in Error.

RAY CAMPBELL,
Attorney for Plaintiffs in Error.
J. GRAHAM CAMPBELL,
Of Counsel.

Hobson-Smith Print, Wichita

INDEX.

Citations—

IN THE

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No. 739.

W. S. PAYNE, L. H. POWELL, ET AL.,
PLAINTIFFS IN ERROR
VS.
THE STATE OF KANSAS EX REL. S. M. BREWSTER,
ATTORNEY GENERAL

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

STATEMENT.

The sole question raised by this writ of error is the validity of Chapter 371 of the Laws of Kansas of 1915, being "An Act in relation to the sale of farm produce on commission." The Act is set out in full in the pleadings (T. R. 7) and in brief provides that no dealer shall sell agricultural products of the soil on commission unless he has paid a license fee of Ten Dollars a year and has furnished a bond "to secure the honest accounting and payment to the consignor for goods consigned to such persons for sale" and has procured a license from the Secretary of the State Board of Agriculture. The State of Kansas, in order to test the validity of the Act, asked the Kansas Supreme Court for a writ of mandamus requiring J. C. Mohler, the Secretary of the State Board of Agriculture to

pay into the State treasury certain license fees paid to him under protest by produce dealers under coercion of the Act, and W. S. Payne, such a produce dealer, was made a party defendant, and all other persons interested in fees paid or to be paid under the Act, being invited to show cause why the Act should not be enforced, L. H. Powell and thirty other grain dealers of Wichita, Kansas, who receive grain on consignment and sell same for a commission, were made parties by intervention.

The matter was heard by the State Court on the uncontroverted facts appearing in the affidavit of W. S. Payne (T. R. 15) and in the joint affidavit of several grain dealers (T. R. 16), and the Act was held to be valid and the writ allowed. W. S. Payne and the intervening grain men prosecute this writ of error to review that judgment.

As indicated in the Answers filed by the intervening grain men (T. R. 3), and the defendant Payne (T. R. 6) there is a great difference between the methods of business of the ordinary produce dealer and those of grain dealers handling consignments. The produce dealer, meaning "produce" as usually understood, does a strictly commission business, selling cabbage and strawberries on commission for the original producer, usually without previous contract with the shipper, who ordinarily cannot dispose of his produce except through commission men, and the produce sold usually has no known standard of quality or price and the shipper has no means of knowing the quality, market value or sale price at destination except as his commission man advises him. A certain quality of strawberries may be the best on the market one day and bring $3.00 a crate, while the same quality on the next day may be third class due to a superior berry coming on the market, and sell for but $1.00 a crate. Quality of produce is usual-

ly comparative, there being no official standard. Moreover ordinary produce is usually sold in small lots and the producer is dependent entirely on his commission man's honesty in obtaining correct returns on his produce.

The business of grain commission dealers, such as the intervenors herein, is very different. They handle only grain in car lots, consigned by country elevators, not by producers, pursuant to contract, and advance the estimated value of the grain before coming into possession of it. Grain has a standard of quality and the shipper is furnished a certificate of the weight and grade of his grain as determined by state or federal officials, and the market price of a certain grade of a grain at any time is known to the world through the market reports available to and familiar to every country dealer and elevator man. The country dealer does not have to consign his grain to a commission man for sale, but can always sell it out right, and when he does consign a car of wheat, because he thinks he can realize more money for it than by selling outright, he does so pursuant to a definite contract with the commission dealer, is paid the estimated price thereof in advance, knows from sources other than the commission man, the quality and quantity and market price at point of sale, and when furnished account sales covering the transaction, the matter is closed except the payment or the receipt of the small difference there may be between the advance payment received by him, and the amount properly due him. The facts on which this matter was presented to the State Court show that this is the manner of conducting the grain commission business.

The facts before the State court not only failed to show any crying need for the regulation of grain commission dealers or that their business was "saturated with false and fraudulent methods" or that any producer was compelled to deal

with them, but on the contrary, the only evidence before the Court (T. R. 20) was that no demand for such a law had ever appeared, that no complaint or dissatisfaction on the part of the consignors had ever been heard, as to the methods of handling grain on consignment, and that the ONLY occasion for any one to consign grain to the interveners was not because of necessity, but because of the belief of the consignor that he would make more profit by so doing than by selling outright.

These plaintiffs in error having been invited into the Kansas Supreme Court to show cause why the Act should not be enforced, and that Court having adjudged that none of the causes shown rendered the Act unconstitutional, such rulings of the State Court are now here for review. And the arguments of plaintiffs in error will be based on the application of said Act to the grain commission dealers of Kansas, the selling of grain on commission being known as handling consignments, as distinguished from direct purchase.

SPECIFICATION OF ERRORS

The Supreme Court of Kansas Erred:

I. In holding and adjudging that Chapter 371 of the Laws of Kansas of 1915 does not abridge the privileges and rights of plaintiffs in error, and is not class legislation and is not violative of the Fourteenth Amendment to the Constitution.

II. In adjudging that Chapter 371 of the Laws of Kansas, of 1915 does not deny to plaintiffs in error and to others within its jurisdiction the equal protection of the laws, and is not discriminatory and is not violative of the Fourteenth Amendment to the Constitution.

III. In adjudging that Chapter 371 of the Laws of Kansas of 1915 does not deprive these plaintiffs in error and others of property rights without due process of law, and is not violative of the Fourteenth Amendment to the Constitution.

ARGUMENT.

I.

THE ACT IN QUESTION CLEARLY ATTEMPTS TO REGULATE THE LAWFUL BUSINESS OF PLAINTIFFS IN ERROR AND ABRIDGES THEIR PRIVILEGES AND HENCE IS CLASS LEGISLATION AND UNCONSTITUTIONAL, UNLESS IT IS FOUND TO BE A LAWFUL EXERCISE OF THE POLICE POWER OF THE STATE.

Referring to the contention that the State cannot regulate a private business unless it is one of public concern, the Kansas Court said in its opinion of this so-called "notion;" (T. R. 23) "But there can be no doubt that the State's police power may extend to private business." Surely the Kansas Court erred in this broad ruling.

We concede that the State has the right under its police power to regulate private business where such regulation is in the interest of the public, or general, health, morals, comfort, safety or welfare. *Cooley on Constitutional Limitations* says:

> "By general police power of the State, persons and property are subjected to all kinds of restrains and burdens, in order to serve the general comfort, health and prosperity of the State."

Of course to affect the general comfort, health and prosperity, the business sought to be regulated must be affected with a public use or interest. And Cooley says:

> "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business and are accommodated by it, cannot be sufficient, for that would subject the stock of the *merchant* and his charges, to public regulation. * * * In the following cases we should say that property in business was affected with a public interest. 1. Where the business is one the following of which is not of right but is permitted by the State as a privilege or franchise (such as lotteries, shows,

pool rooms, etc.) 2. Where the State on public grounds, renders to the business special assistance, by taxation or otherwise. 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public."

Can the grain commission business be possibly assigned to any of such classes?

Plaintiffs in error are engaged in a lawful and legitimate business—the selling of car-lots of grain for country elevators on commission—a business recognized as proper since commerce started. They are citizens of Kansas, devoting their time, efforts and capital to such business, not itinerate peddlers or traveling agents. Their business is limited to contractual relations with a very small number of country shippers or elevators, and affects only themselves and the particular country elevators which consign grain to them for sale. They are not public warehousemen or engaged in the operation of public elevators and do not hold themselves out to the public generally as sellers of grain on commission. They receive consignments of grain only from those with whom they have contracted to do so. Neither usage, law or necessity compels country elevators to have their grain sold on commission. Moreover the country elevator *always* receives from the commission man an advance payment on consigned grain of the estimated sale price thereof, and more often than not is over paid in advance, in which case the financial condition of the commission man does not concern him. And there is no opportunity for the commission man to defraud the shipper as to the quality or quantity of the grain consigned for that is determined by State or Federal officials and the price at which sold is easily ascertainable. As the evidence before the State Court shows (T. R. 16-Third) the grain is sold on

consignment in the following manner: A country dealer having a car of wheat for disposal may sell same outright, on any day of the year, to one of these plaintiffs in error or to any mill or grain dealer, at the then market price, all such sales being made on the basis of the weight and grade of such wheat as officially determined at point of destination. He then attaches the bill of lading covering the shipment to his draft on the buyer for the sale price, less a margain to cover discrepancy in weight and grade between origin and destination, and discounts the draft at his local bank. After delivery at destination, the buyer furnishes account sales showing the weight and grade there and remits any balance there may be due the seller or draws on him for the amount of any overdraft in the advance payment. If the country dealer must dispose of a car of wheat, either to make room in his elevator, or to raise money, and believes that the market price will increase in the next few days, then, instead of selling outright at the then market price, he *contracts* to consign the wheat to a commission man, to be sold on arrival, attaches the bill of lading to his draft on the commission man for the estimated price at which it will sell, less a margin to cover discrepancies in weight and grade between origin and destination, and discounts the draft at his local bank. After sale at destination the commission man renders account sales showing weight and grade at destination and price received, deducts his agreed commission and remits any balance there may be due the shipper. And whether the balance is due to or from the shipper, after deducting the advance draft from the net sale price, depends usually on whether the market has advanced or slumped.

Everyone of the interveners in this proceeding are engaged in the business of buying and selling grain as well as handling it on commission. And any country elevator can sell

its grain outright to any one of the interveners at any time that it can be consigned, and the shipper takes as much risk of being defrauded in one case as in the other. The only difference between a sale and a consignment of grain is that in a sale the shipper knows in advance what profit he will make and the dealer takes his chances on the market, and in a consignment the commission man knows in advance what he will make out of the transaction and the shipper takes the chances on the market. The only occasion or excuse for the consignment of grain rather than the outright sale thereof is that it affords the country elevator a polite means of gambling to a limited extent on the future market.

We emphasize the methods of conducting the grain commission business, because the decision of the Kansas Court is predicated upon an entirely different premise of fact, its opinion stating that the tendency of the commission business "seems to be to centralize in the larger cities far removed from the points of origin, and where by no practical possibility can the originators of the traffic, the consignors, keep personal check on the doings of the commission merchants who are merely the agents of the consignors." "It is practically impossible for the ordinary *farmer* or *fruit producer* or *truck gardener* to market his own products without the agency of the commission merchant."

Whatever justification there may be for the regulation of the sale of produce, fruit or garden truck on commission for the producer, cannot cure the Act in question of any invalidity resulting from the regulation of the grain commission business. As said by this Court in *Coppage vs. Kansas*, 236 U. S. 1:

> "A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being entitled

under a title that declares a purpose which would be a proper object for the exercise of that power."

Our contention herein is that the grain commission business is in no way affected with a public or general interest. It does not affect the public health, as perhaps does that of doctors, druggists, or plumbers. It does not affect the public morals as does that of selling liquor, running pool rooms or gambling houses. It does not affect the public safety as does the railroad or street car business or does it use public property as do automobiles, and circuses, or get public assistance as do businesses aided by bonds or bonuses, or is it granted any exclusive privileges.

The only excuse for the regulation of the grain commission business is that it affects the public or general welfare. And plaintiffs in error insist that the public generally is not concerned in their businees and that the public welfare is not affected thereby.

In *Munger vs. Kansas*, 123 U. S. 623, the Kansas prohibition law was being considered and this Court held:

> "It belongs to that department (legislature) to exert what are known as the police powers of the state, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state." The Courts "are at liberty—indeed are under a solemn duty— to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

What real relation to the public welfare or safety can this Commission law have?

In *Lawton vs. Steele*, 152 U. S. 133, was considered a law relative to confiscation of fish nets, and the Court said:

> "To justify the State in thus interposing its authority in behalf of the public (under police power) it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarly impose unusual and unnecessary restrictions upon lawful occupations."

The best that can be said of this Act is that the interests of a particular class, country grain dealers, require protection.

In *Brass vs. Stoesser*, 153 U. S. 391, relative to State regulation of grain elevators, Justice Brewer in a dissenting opinion, quoting previous decisions, says:

> "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

In *G. C. & S. F. Rly. Co. vs. Ellis*, 165 *U. S.* 150, a Texas statute was held invalid which penalized a railroad, by assessment of attorney fees, for failure to promptly pay certain claims, and in the opinion is this:

> "A mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors."

And does any special duty rest on grain commission dealers to pay their debts? The Act requires commission dealers to file a bond "to secure the honest accounting and payment to the consignor for goods consigned to such persons for sale" and the Secretary of Agriculture, intrusted with the enforcement of the Act, has required that such bond shall be executed by a surety company, in the sum of $2000.00, which means a cost of $10.00 a year. The public generally is not concerned in the payment by commission men of their private debts to consignors, and the bonding of private debtors "does not come within the scope of police regulation."

In *Cargill vs. Minnesota*, 180 *U. S.*452, a state law requiring the licensing of grain elevators, was upheld, on the ground that the elevator, in buying grain, themselves weighed, graded, and inspected same, being "a sort of public market place." And this Court held:

> "Surely such a business is of a public character and is sufficiently affected with a public interest to warrant a considerable amount of regulation of it by the state."

This indicates the difference between a public and a private business. It may be remarked in passing, that the country elevators, the only ones possibly benefited by this Act as it applies to grain men are "a sort of public market" and do their own weighing and grading when buying from the farmer, yet they are not regulated, or bonded to insure the payment of their debts to the farmers.

In *Dobbins vs. Los Angeles*, 195 *U. S.* 223, it is said:

> "It is now thoroughly well settled by decisions of this court that legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law is a lawful exercise of the police power, or whether under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business,

to make contracts, or to use and enjoy property."

In *Lochner vs. New York*, 198 *U. S.* 45, a law regulating the hours of labor of bakers was held not a valid exercise of police power. Holding that police powers "relate to the safety, health, morals and general welfare of the public" and that there are no grounds for interference with the liberty and rights of bakers, this Court said:

> "There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state interfering with their independence of judgment and action. They are in no sense wards of the state."
>
> "The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation."

So herein, the welfare of the *individual consignor* of grain only, not of the public, is affected, and surely there is no vital necessity that the state appoint a guardian of such individuals. If they are able to contract for the *sale* of grain to these interveners, they must be competent to contract for the *consignment* of grain to them.

In the multitude of decisions of this Court involving the right of a State to regulate a private business, the distinction is always clearly drawn between private welfare and public welfare, and we challenge opposing counsel to cite a decision upholding the police power of a state to regulate a business that is not based on the public nature of such business or the general welfare that is served by such regulation.

In *Noble State Bank vs. Haskell*, 219 *U. S.* 104, the Oklahoma law providing for the guaranty of bank deposits was

upheld as a valid exercise of police power, because the law was found "to be greatly and immediately necessary to the public welfare" which "require the measures under consideration."

In *Eubank vs. Richmond*, 226 *U. S.* 137, a city ordinance relative to building lines on certain streets was held invalid as an exercise of police power which extends it is said "not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity."

Surely the regulation of the business of plaintiffs in error promotes neither public convenience or general prosperity.

This Court in *German Alliance Insurance Co. vs Lewis*, 233 *U. S.* 389, holds that the Kansas Act regulating fire insurance rates is valid, as a proper exercise of police power, on the ground that the business of fire insurance is affected with a public interest. And in the opinion is this:

> "Is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a *broad and definite public interest.* In some degree the public interest is concerned in every transaction between men, the sum of the transactions constitutiong the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation."

And *Munn vs. Illinois* 94 *U. S.* 113, and *Brass vs. North Dakota*, 153 *U. S.* 391, both upholding state laws regulating public elevators and warehouses, are approved, it being clearly shown that such businesses are of a public nature. "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."

The distinction is obvious between the business of bank-

ing, insurance, public warehousemen, etc. and the purely *contract* business between *two individuals* such as the grain commission business.

This Court in *Adams vs. Tanner*, 244 *U. S.* 590, declared invalid the Washington Employment Agency Law, as an unwarranted infringment upon the individuals right to engage in a lawful and useful business. This decision is enlightening not only because so recent but because of the discussion in the dissenting opinions. This Court finds "that there is nothing inherently immoral or dangerous to public welfare" in the business regulated and because abuses may and probably do arise in the business "is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." And *McLean vs. Arkansas*, 211 *U. S.* 539 is quoted with approval as follows:

> "If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to *contract* or *carry on business*, and *having no just relation* to the protection of the public within the scope of legislative power, the act must fail."

In a lengthly dissenting opinion Mr. Justice Brandeis justifies the law in question on the theory that "a consideration of *relevant facts*, actual or possible" shows grave evils to exist in Washington in the employment agency business, its abuses, the inadequacy of the system and the general effect on the public welfare being such as to warrant the control of the business under the police power of the state. In other words this Court seems to have divided on the *question of fact* as to whether the public welfare REQUIRED the control of the employment agency business, the majority of the Court holding not and four justices dissenting.

In its opinion the Kansas Supreme Court cites and quotes from decisions of other State Courts as authority for the regulation of commission merchants under the police owner. A careful analysis of these cases will show that the decisions are all based on the public nature of the business regulated, and the public and general welfare to be served.

The Minnesota decision, *State vs. Wagener*, 80 *N. W.* 633, admired by the Kansas Court, upholding a commission dealers license law similar to the Kansas act in question, is based squarely on the "*relevant facts*" which show the *necessity of* the regulation of the commission dealers. After ruling in its opinion that police regulations were justified when "necessary for the general welfare of all and to promote the public welfare" and to "prevent the infliction of *public* injury" if such regulations "embrace all persons alike under similar circumstances," the Supreme Court of Minnesota finds as a fact that at the time the Law was enacted, in 1898, there was a crying need for such a law; it was "common talk among the people that those who handled wheat imposed upon their consignors" by giving false weights, grades, and prices; that "great numbers besieged the legislature" for such a law; that the business had "become saturated with false and fraudulent methods to the great injury of a large class of our citizens who were *compelled* to deal with commission men and who were *powerless* to detect or prevent the wrong."

Absolutely no showing was made of any such condition existing in Kansas. In fact, the only evidence before the Kansas Court, (T. R. 20-tenth) shows affirmatively that such condidtions do *not exist*. Moreover the evidence shows that at the time the Kansas law was enacted, all grain was sold on official weights and grades, while Minnesota did not have official weighing and grading of grain until the enactment of

chapter 157 of the Laws of 1909, nine years after the enactment of the commission dealers law of that state. In other words, as shown by the relevant facts, the condition which justified the Minnesota regulating Act on behalf of the *public*, does not exist in Kansas. Conceding the correctness of the conclusions of law in the Minnesota decision, based on the findings of fact, we contend that such conclusions cannot be pertinent to the *facts* before the Kansas Court and now before this Court.

The Case of *Hawthorn vs. People* 109 Ill. 302, decided in 1883 is quoted at length. (T. R. 25). Therein an act requiring operators of butter and cheese factories on the co-operative plan to give bonds, was held valid, as a proper exercise of police power "for the protection of life, liberty and property, or for the general welfare." But it was found that the operator was dealing with the *public*. "He holds himself out as a factor for the management and sale of other people's property, and in that respect is like a public *warehouseman*." While such facts might warrant the regulation of that Act, no such facts appear herein. It is true that in its opinion (T. R. 27) the Kansas Court does says that "A commission merchant's business is that of a *warehouseman* and Sales Agent" but such statement is absolutely unwarranted by any facts. The commission dealers do not operate elevators or storage houses and are not *warehousemen* in any sense of the word.

In the later case of *Lasher vs. People*, 183 *Ill.* 226, the same Court, in considering an Act to regulate and license commission dealers in butter, eggs, etc. while holding the Act invalid because the licensing power was granted to appointees of a corporation, as is done by the Kansas law, held that the Act was not invalid because of an arbitrary classification,

same applying to dealers in the *small* products of the farm, and exempting dealers in cattle, *grain* and dressed meats, because the *shippers of* cattle, *grain* and dressed meats were *protected by the State inspection laws!*

The Commission Merchants Law of Washington which the Kansas Court says in its opinion is *similar* to the Kansas law and was upheld in *State vs. Bowen*, 149 *Pac.* 330, is not similar, and its constitutionality was not directly passed on as the case cited was a criminal matter and it was said:

> "We conceive it to be the unquestioned rule that a person cannot invoke a constitutional objection to a part of a statute not applicable to his own particular case."

The Michigan Commission Dealers Law was held unconstitutional in *People vs. Berrien Circuit Judge*, 83 N. W. 594, and this decision was urged before the Kansas Court, which disposed of it with the remark in its opinion (T. R. 26) that "the particular clause or clauses of the constitution, state or federal, which the statute was held to infringe was not cited *nor even hinted* at!" And this in spite of the ruling that the law was "class legislation" and "an unjustifiable interference with the right of citizens to carry on legitimate business!" We insist that this was a *hint*. We consider the decision a concise statement of the law applicable herein, the facts being similar, and quote as follows:

> "The business of buying and selling on commission has existed ever since commerce began. There are and always have been dishonest men engaged in it, as there are and always have been in every other branch of business. There are and always have been dishonest sellers, who will pack their produce in such a manner as to deceive. It would be as reasonable to require the latter to give bond to properly pack their produce. In every such case the common law provides an ample remedy for redress to the injured party for breach of contract. There is no more reason why a commission merchant should pay a license fee, and execute a bond to pay his debts and to

do his business honestly, than there is that any other merchant should pay a like fee, and file a like bond to properly do his business and pay his debts. *The business requires no regulation*, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, morals or even convenience of a *community*. It is carried on by *private* persons in private buildings, and in a manner no different from that in which any other merchant selling hardware or groceries or dry goods carries on his business. The law can find no support in the police power inherent in the state. It is not like the liquor traffic, which, under the decisions of every court, is subject to the police power because of the injury it does to the health, morals, and peace of the community, and may be prohibited altogether. Neither is there anything in it requiring regulation, as do hack drivers, peddlers, keepers of pawn-shops, and the like. The legislature of this state is not empowered by the Constitution to regulate *contracts* between its citizens who are engaged in legitimate *commercial business*, or to require any class of persons to pay a fee for the right to carry on business or to give a bond to perform their contracts which other parties may choose to make with them. The Constitution guarantees to citizens the right to engage in lawful business, unhampered by legislative restrictions, where no restrictions are required for the protection of the public."

So we contend that there is nothing about the commission business, especially the grain commission business, as carried on by the parties hereto, that requires or justifies its regulation. It is strictly a *private, contract business* which no consignor is *compelled* to patronize.

The public has no concern in such business, as there is nothing in it hostile to, or even affecting the comfort, morals, welfare or even convenience of a community. There is no more occasion to require commission merchants to put up bonds to pay their private debts than there is to require elevator operators, farmers and lawyers to furnish such bonds.

Surely the Kansas Act in question is unconstitutional as

class legislation and as an unlawful abridgement of and interference with the contract rights of private parties, and is an improper exercise of the police power of the State.

II.

THE ACT IN QUESTION DEPRIVES THE PLAINTIFFS IN ERROR OF EQUAL PROTECTION OF THE LAWS, IS DISCRIMINATORY, MAKES AN UNJUST AND UNWARRANTED CLASSIFICATION OF CERTAIN BUSINESSES AND IS UNCONSTITUTIONAL.

Should this Court find, from the *relevant facts*, that Kansas was justified, under its police power, in regulating the private business of commission merchants, it must find that the Act in question is invalid if it arbitrarily discriminates against plaintiffs in error, or if the classifications of the Act do not "rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

The Act applies to the sale on commission of "all agricultural, horticultural, vegetable and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts and honey," specifically exempting "timber products, flora-cultural products tea, or coffee, and farm products "sold for consumption and not for resale" and by the wording of the Act also exempting cattle, hogs, hides, wool, hay, seeds for retail, which are *all* products of the farm, and also exempting those commission merchants who sell implements, jewelry, books, pianos and the various other kinds of merchandise ordinarily sold on consignment for a commission.

The Act also makes it a crime for a limited class of merchants, that is, those selling certain kinds of farm products on commission, to impose false charges; to fail to account promptly to consignors with intent to defraud; to "make

false or misleading statements;" to make statements as to market conditions with intent to deceive; to enter combinaions to fix prices; or to make false statements as to grade, condition, quality or quantity of goods shipped, with intent to deceive.

It will be noted that the classification is not based on the kind of *business*, commission or otherwise, but on the *kind of article* sold on commission. The legislature apparently did not think that merchants needed regulating, nor even commission merchants, but that the business of selling certain particular articles did need to be under the control of the state. Not all merchants, not even all commission merchants, are required to put up a bond to cover payment of their debts, but dealers in a few commodities, not *all* farm products, are required to furnish such bonds before they can do business.

The most glaring discrimination of the Act is that in favor of live stock commission dealers. There are probably as many live stock commission dealers in Kansas as grain commission men and their business is handled in the same way. Cattle or hogs are shipped to them and they go on the market at the various stock yards and sell same to various buyers. Like the grain men, they have no control over the inspection or weighing, same being done by officials The market price of cattle or hogs varies as much in a day as does that of wheat or corn. They use their judgment as to what offer to accept, and then account to the consignor for the proceeds of the sale, less weighing, inspection, commission and other charges. They have the same opportunities to defraud their consignors as do the grain men, and as a class, are no more honest, or dishonest than the grain men.

The only differences between these two kinds of the same general class of commission merchants would indicate a much

graver necessity for the application of the Act to the cattle dealers than to the grain men. In *every instance* when *grain* is consigned to these commission dealers, it is in car-lots and the estimated sale price is ADVANCED to the consignor before the consignee can get possession, and should the consignee go broke, or abscond, after a sale and before settlement, the consignor could lose but whatever small margain he left in his draft, with the probability that the margin would in fact be due the consignee. It is rarely, if ever, that a cattle dealer pays drafts on cattle consigned to him, or advances any money on them, and if he should go broke, or abscond, after sale and before remittance, or have his funds attached, the consignor might be out the total proceeds of his stock. The reported decisions show instances of the later catastrophe.

Again, the grain dealer accepts consignments only from *dealers*, and in *car-lots*,—never direct from the farmer. Reported litigation based on the refusal of certain of these plaintiffs in error to accept grain from "scoopers" or others than elevator men, indicates that they do not deal with the public at large. The business of the cattle dealer, on the other hand, consists almost entirely of handling consignments direct from *farmers* or *stock men*, the *public*, in car-lots or on the hoof. Any consignor to these interveners can sell the same grain outright, should he desire, but it is a practical impossibility for a consignor of cattle to sell direct on the market. Theoretically, he might be able to himself peddle his cattle to the buyers at the stock yards, but any one who has tried such procedure can vouch for the difference between theory and practice. So the cattle dealer who is intrusted with the funds of the consignor, who is generally the *producer* himself, and who is *compelled* to do business with the commission man,

does not have to be licensed or bonded, while these interveners, who are NOT instrusted with the funds of consignors who are not the *public*, but a limited class of dealers and who are *not* compelled in any way to consign their grain, are burdened by this Act.

Furthermore, he who sells grain on consignment is guilty of a crime if he fails to account properly for the proceeds of sales or makes false and misleading statements, while the dealer is innocent of crime who sells plows, binders, cattle, jewelry, roses, tea or coffee on consignment, though he account not at all for the proceeds of sales, or makes any and all kinds of false and misleading statements. What reason is there why the wholesaler, who receives a car load of coffee, on consignment and sells same to the retail grocer should not be required to account properly for the proceeds thereof or to limit himself to true statements?

One who runs an elevator in a country town, to whom the *public* is *compelled* by *necessity* to sell its grain, and who does his *own* weighing and grading, can lie all he wants to the farmer as to market price, quantity and quality, and can then consign that grain to one of these interveners, and misrepresent the quality, grade and quality of such grain in his invoice, and thereby get an advance payment thereon much in excess of the sum that can possibly be due him, and he is not amenable to this law,—is not under bond either to the farmer, his consignee, or to the Secretary of the State Board of Agriculture. Yet these commission men, accepting consignments only by contract from those of a limited class, themselves experts in the grain business and who know in advance the quality, quantity and grade of the grain so consigned, have a special penal statute passed for their benefit and must furnish a surety company bond, secured after convincing some surety

company that they have plenty of cash in the bank, waiving all exemptions, and paying $10.00 a year, conditioned to pay such consignor any balance due him, should he make a mistake and UNDER-DRAW on the consignment.

Moreover, a corporate official, the Secretary of the State Board of Agriculture, may compel one of these interveners, under oath, to produce all his business data and be examnied in detail, and if such corporate official believes that any one of eleven specified things are true, "he *shall* bring an action on the bond within sixty days." By section 4, in connection with Section 5 (h) of the Act (T. R. 9) if said corporate official, "has reason to believe that *bankruptcy* or *insolvency* may shortly accur," "*he shall* bring suit on the bond within sixty days." The Act does not say who shall profit if recovery is had on the bond, but we assume that the purpose of the suit is to insure the correctness of the secretary's guess as to approaching bankruptcy, which would "shortly occur" when the surety company tied up the bonded one's assets.

None of the various commission dealers not amenable to this Act are compelled to submit to such inspection of books and suits on bond, should some one have reason to believe that insolvency MAY occur. It might be advisable to have ALL merchants subject to inspection and under bond, but every possible reason for such regulation of grain commission merchants, applies with equal force to coffee, cattle, hide and real estate commission merchants.

Again, this act makes it a crime for these interveners to combine to fix prices. Assuming for the moment that it were possible to do so, in spite of the Kansas City, Chicago and Liverpool grain markets, the green bug, Mr. Hoover and the telegraphic market reports and the reasonable fixity of freight rates to all markets, such provision of the Act de-

prives these interveners of equal protection of the law, because it does not apply to cattle commission men, carpenters, doctors, farmers and country elevators. The unanimity with which the courts of the land have declared invalid anti-trust laws which did not apply to all, indicates the unconstitutionality of this Act.

And why should a commission man be guilty of a crime who "shall make false or misleading statements?" The consignor of grain would be the first to complain if his consignee refrained from all misleading statements as to the desirability of such grain, and answered a prospective buyer by telling him that the shipper had a reputation of putting musty, binburnt and weevil laden wheat in the end and corners of the car where the state inspector would probably miss it.

There are literally thousands of reported cases declaring laws invalid under the equal protection clause of the Fourteenth Amendment, and it is difficult to limit citations. We refer the Court to but a few of the many which are applicable. The distinction made in all the decisions is that while classification may be made, it must be reasonable and based on actual distinctions.

In *G. C. & S. F. Rly Co. vs. Ellis*, 165 *U. S.* 150, a Texas statute was held invalid which assessed attorney fees against carriers only, in certain cases, and the Court, in discussing the classification made, said:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * In all cases it must appear not only that classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification."

Connelley vs. Union Sewer Co., 184 *U. S.* 540, found violative of the equal protection clause of the Constitution, an

Illinois statute forbidding the fixing of prices, because it provided that same "shall not apply to agricultural products or live stock while in the hands of the producer or raiser." This same fault appears in the Act in question. In declaring this arbitrary selection, the court quoted its decision in *Barber vs. Connolly*, 133 *U. S.* 27, as follows:

> "That no impediment shall be interposed to the pursuits of any one, except as applied to the same pursuits of others UNDER LIKE CIRCUMSTANCES; that no greater burdens shall be laid upon one than are laid upon others in the SAME CALLING AND CONDITION.

In *A. T. & S. F. Rly. Co. vs. Vosburg*, 238 *U. S.* 56 this Court held that the Kansas reciprocal demurrage law was invalid as allowing attorney fees to one party and not to the carrier, in certain litigation, such distinction and selection being arbitrary. In the opinion is this:

> "We cannot at all agree that a police regulation is not like any other law, subject to the 'equal protection' clause of the 14th Amendment. * * * The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

In *Hadacheck vs. Sebastian*, 239 *U. S.* 394, this Court declines to find that a city ordinance prohibiting brick making within certain limits discriminates against the petitioner for the reason that the record before it fails to show that the same business is not regulated or prohibited in other districts, or that other objectionable businesses are permitted in the same district. The record herein shows by the undisputed facts before the state court that the Act in question does discriminate between the grain commission business and other com-

mission businesses, leaving the decision squarely up to this court as to whether such dscrimination is arbitrary and unreasonable or not.

Rast vs. Van Deman & Lewis Co. 240 *U. S.* 342, upholds the Florida law taxing the trading stamp business, on the ground that the legislature was the judge of the necessity of the regulation, and of whether the trading stamp business has "the seduction and evil" of lotteries or gambling. But this Court qualifies the legislative power in these words:

> "Other cases might be cited * * * which would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts, and, in the exercise of the power, to classify objects, upon its conception of public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary."

Surely the unreasonable and arbitrary classification made by the Act in question warrants this Court in reviewing the decision of the State Court.

Tanner vs. Little, 240 *U. S.* 369, upholds the Washington law imposing a prohibitive license fee on the use of trading stamps, upon the authority of *Rast vs. Van Deman*, supra. In the opinion, Mr. Justice McKenna says of classifications of business subject to regulation under police power:

> "Classification is not different in law than in other departments of knowledge. 'It is the grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those particulars.' Upon what differences or resemblances it may be exercised depends necessarily upon the *object in view*, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct dependent upon it, and distinguish in legislation between red-haired men and black-haired men, and the classifica-

> tion would immediately be seen to be wrong, it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered. It may not make the distinction adverted to, but it may make others the appropriateness of which, considered logically, may be challenged. (Giving instances.) Those were instances of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the restriction and regulation were in the interest of the *public welfare.* Those classifications were sustained as legal, being within the power of the legislature over the subject-matter, and having *proper basis of community.*"

And referring to the authority to deal with that at which legislation is aimed, it is further said: "If there is no such authority, a classification, however logical, appropriate, or scientific will not be sustained."

It would be as logical to require red-haired commission men to be licensed and bonded and to exempt those with black hair, as to make the classification that this Act does. For under it not only are merchants divided into commission merchants and others, but commission merchants are arbitrarily subdivided into those who sell dressed beef and those who sell live beef; those who sell beans and those who sell coffee; those who sell cauliflower and those who sell flowers; those who sell strawberries to the grocer and those who sell them to the house-wife; those who sell blackberry bushes and those who sell catalpa trees.

What was the "object in view" in requiring the licensing and bonding of commission merchants? The object as announced by the author of the Act and as argued by the attorney general and as indicated by the State court was to protect the *producer* or *farmer.* Aside from the fact that the Act cannot possibly accomplish that object by the regulation of grain commission men who never deal with the farmer or producer, how is the Kansas farmer protected by a law which

regulates *nut* dealers and does not regulate *cattle* dealers?

In the following state decisions, various laws licensing peddlers were held discriminatory and invalid because they did not apply to *all* of the same general class, the classifications bearing no relation to the purposes of the laws:

Brownlach vs. North Wales (Pa.) 49 *L. R. A.* 466.
State vs. Whitcom (Wis.) 99 *N. W.* 468.
Smith vs Farr (Colo.) 104 *Pac* 401.
Ex Parte Stoddard (Nev.) 131 *Pac.* 133.
State vs. Ashbrook (Mo.) 48 *L. R. A.* 265.
Kansas City vs. Grush (Mo.) 52 *S. W.* 286.
State vs. Wright (Or.) 100 *Pac.* 296.
State vs. Coulson (Conn.) 31 *L. R. A.* 55.

In the Coulson and Wright cases, supra, the classifications were based solely on the articles sold and were declared arbitrary. In the Wright case, after conceding the right of the state to regulate peddlers, the court says:

> "This however, is because gross frauds and cheats are likely to, or may, attend the business if carried on by irresponsible and dishonest persons, and *not because of the articles sold.*"

If a valid classification of commission merchants can be based on the different commodities sold, which we deny, a classification based on any distinction between sellers of grain and sellers of livestock, both farm products, cannot be reasonable. In *Lasher vs. People*, 183 *Ill.* 226, a license law was upheld which distinguished between dealers in "the small products of the farm" such as butter and eggs, and in grain, livestock and dressed meats, the exemption of the latter classes being held reasonable because "The State laws for the *inspection of grain* provide for the protection of shippers in that market."

If there is any reasonable distinction that can be drawn, on the basis of the article handled, between grain commission merchants, and cattle, piano, implement, jewelry, or book com-

mission merchants, then surely it is the grain dealers who should be exempted from regulatory laws, and not such others.

In considering this question of arbitrary classification the Kansas Supreme Court in its opinion (T. R. 24) finds that the classification of commission men by the Act in question is reasonable because "it *practically* reaches all the *important* and *useful* products of farm and truck garden. It specifically exempts matters of *little consequence* to the Kansas *producer.*"

A local politician claims to be *practically* honest. Is that enough? And how is the Kansas *producer* interested in the grain commission business? And does the fact that a product is "of little consequence to the Kansas producer" (cattle for instance) justify the exemption of its sale from regulation, when the sale of other farm products (such as nuts and garlic) is regulated? And if the classification is to be based on the *usefulness* or *importance* of a product, should its usefulness to the producer or to the consumer be considered? And on the basis of usefulness, why regulate the sale of garlic and not of coffee?

Further in its opinion the Kansas Court says that "it is practically impossible for the ordinary farmer or fruit producer or truck gardener to market his own products without the agency of the commission merchant," thus disregarding entirely the facts before it. The record shows that the sale of grain, the most useful and important product of Kansas, on commission for the *farmer* or *producer* is unheard of. A classification of the sale of farm produce on commission based on the importance or necessity or extent of the business as it pertains to the producer or farmer is arbitrary and unreasonable which includes wheat and exempts cattle in the articles so sold.

The Kansas Court justifies the exemption by the Act of live stock; "since livestock is almost invariably shipped in *car loads* and is so *valuable* as to justify the producer or shipper in the expense of accompanying his shipment to market and personally supervising the fidelity of the commission merchant who makes the sale for him or in making the sale himself."

Apparenty then the basis of classification should be the value of the article sold, or the way it is shipped. The record shows that consigned grain is *always* shipped in carlots while a large percentage of the livestock delivered at Kansas Stock-yards is driven in on the hoof or hauled in wagons. Moreover, the market reports and some figuring will demonstrate that a car load of wheat is worth more than a car load of cattle or hogs. On this theory a country elevator man should come in with his consigned car of wheat, and read the inspector's certificate of weights and grades and the market quotations, while in the city, instead of reading the same things the next day at home, all rather than consign the wheat in, with draft for the estimated sale price cashed at his local bank before the car leaves his elevator. And as to cattle shippers accompanying their cattle to market, any one knows that that is either for the purpose of poking their cattle up with a prod pole, should they get down in the car in transit, or else to take advantage of free transportation for an opportunity to see the city sights. Of course if country elevator men, because of the *value* of the shipments, are justified in accompanying same to market and in making their own sales, the grain commission business would cease to exist.

But can a police regulation of the commission business be reasonably classified on the basis of the value of the articles sold? Why should a dealer selling a few dollars worth of

onions be bonded to pay his consignor, while the dealer selling a few thousand dollars worth of cattle be exempted from such regulation?

So plaintiffs in error contend that the Act in question is unconstitutional as discriminatory, and that the Kansas Supreme Court erred in holding that the Act in question is valid and does not deprive them of equal protection under the laws, for even if the legislature was empowered, under the police power, to regulate merchants, it was a discriminatory and unreasonable classification to distinguish between different kinds of merchants, and between different kinds of commission merchants and even between commission merchants who handle different kinds of farm products.

III.

THE ACT IN QUESTION IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES THE PLAINTIFFS IN ERROR AND OTHERS OF PROPERTY AND PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW.

The Act provides that the Secretary of the State Board of Agriculture, an official of a corporation, shall have the power to grant or revoke licenses. Before a commission merchant can get a license to conduct his business, he "shall further satisfy the secretary of the State Board of Agriculture of his or its character, responsibility and good faith in seeking to carry on a commission business," and furnish "a straight indemnity bond satisfactory to the Secretary" which bond to be satisfactory to said Secretary must be a $2000.00 surety company bond. The Secretary is also empowered to investigate the business conduct and methods of any licensee, and he may refuse or revoke a license if he finds that any one of eleven different cases exist, such as an unsatisfied judgment, a combination to fix prices, false statements, or where

the secretary has reason to believe that "insolvency may shortly occur." Is judicial or administrative power thus conferred on the secretary of a corporation? The legislature then attempted to give the commission merchant his day in court by providing that any action of the secretary, in refusing or revoking licenses, "shall be subject to review by a writ of certiorari," the dealer to retain his license, if he has one, until a final determination of the proceedings.

As the opinion of the State Court concedes, the State Board of Agriculture is comprised of the officials of the Kansas State Agricultural Society, a corporation, they being elected by a ballot of the members. The Secretary of the corporate Society is constituted the Secretary of the State Board of Agriculture. This Secretary is not elected by the people or appointed by any executive of the State, is not under bond, as are members of the Board of dental examiners, nor under oath as are brand inspectors. Whoever happens to be secretary of the corporation is secretary of the State Board of Agriculture, and has power to determine the character, responsibility, and probable future insolvency of all commission merchants desiring to conduct their business in the state, and if he is satisfied that insolvency of a commission merchant "may shortly occur" he *shall* bring an action on such merchant's bond, and may refuse or revoke such merchant's license.

It is clear that this corporate official has the power to put or keep any commission merchant out of business, and this power must be judicial to constitute due process of law. But the state court says (T. R. 26): "It merely confers upon him administrative power such as has become common in this state." "The exercise of such power is merely the exercise of administrative discretion." Then if this is administrative power by a corporate official the commission mer-

chant may be deprived of his business without due process of law, unless there is some other provision of the Act that gives him judicial protection. And the legislature sought to furnish such protection by providing that the administrative actions of the secretary "shall be subject to review by a writ of certiorari."

As conceded in the opinion (T. R. 28): "The writ of certiorari was abolished in 1868." There is not a thing in the Act in question or in any statute of Kansas, indicating how a writ of certiorari, which has been abolished, can be used by suffering commission merchants. The State Court says: "But our legislature which abolished the writ in 1868 had undoubted power to reestablish it in 1915." Conceded, but can they change the code of civil procedure by implication, or inference, in a law regulating commission merchants, and without therein making any provision as to method, procedure, or courts or "tribunals" from or to which it may issue?

The writ of certiorari having been heretofore abolished in Kansas all of the law on the subject which could govern such a review is contained in the Act in question and the sole provision of the Act is that the actions of the administrative officer "shall be subject to review by a writ of certiorari."

This seems scant guidance for the aggrieved commission merchant who desires that his rights shall be determined by due process of law. Suppose one of these plaintiffs in error should be refused a license on his application to the secretary therefor. What would he then have to do to procure a judicial review of such refusal? To what court would he apply for the writ of certiorari? Of what would the record consist? Who would pay therefor? Would new evidence be admissable on review, would it be a hearing de novo, or would the review be based solely on the record that might possibly

be brought up from somewhere? The laws of Kansas are silent as to all these matters.

In 5 R. C. L. 258, the author says:

> "It may be stated as a universal rule, however, that as the province of the writ of certiorari is to review a record of an inferior court, board, or tribunal, and to determine *from the record* whether such court, board or tribunal has exceeded its jurisdiction, evidence, dehors the record, and contradicting it, is not permitted *in the absence of statutory authority.*"

There being no statutory authority of any kind in Kansas, relative to the writ, except that contained in this Act, there would be no record to review. The mental processes and conclusions of the secretary would bind the commission merchant, and even could he obtain a writ of certiorari from some court by some process, the only question then for determination would be as to the jurisdiction of the Secretary. True, the Kansas Supreme Court, after an amplificative disquisition on writs of certiorori in general, finally figures out that the district courts might issue the writ mentioned in the Act, but that conclusion, in itself, fails to furnish any guidance to one seeking a review, as to methods and manner of procedure. The truth is that the author of this Act copied it from an act proposed in some other State where the writ of certiorari exists and is operative, failing entirely to consider the rights of those Kansas citizens who might be affected.

Furthermore, the acts of the Secretary in refusing or revoking licenses being concededly administrative, it is our contention that same could not be judicially "reviewed" by writ of certiorari even though such writ was provided for by the Kansas code of civil procedure. Our contentions are well advanced by Mr. Justice Marshall of the Kansas Court in his dissenting opinion (T. R. 29). As there said, quoting from 5 R. C. L. 258:

> "The courts are unanimous in holding that the writ of certiorari will lie to review only those acts which are judicial or quasi judicial in their nature."

And at page 251 of 5 R. C. L. the functions of the writ are further defined:

> "It must be borne in mind that the functions of certiorori are simply to ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of law have not been observed or on that of the want of jurisdiction in the court entertaining them. The writ has never been employed to inquire into the *correctness* of the judgment rendered where the forms of the law have been followed, and where the court had jurisdiction, and was therefore competent."

So we have a law providing that the secretary of a corporation may refuse to confer on any of these plaintiffs in error the right to conduct his business, if "he is satisfied" that insolvency may shortly occur, or that certain other conditions exist. And a license may be refused without any hearing of any kind or opportunity to the commission merchant to present his side of the case, all the provisions of section 4 of the Act, relative to notices and hearing, pertaining to the bringing of an action on the bond. And if the secretary, possibly with no evidence before him and without notice to the applicant, concludes in his own mind that he is satisfied of certain existing conditions, then the applicant is refused a license and is guilty of a crime if he does business without a license. His only relief then is the writ of certiorori provided for by the act. Assuming that such a writ would lie to review the administrative acts of the secretary, the reviewing court could not consider the *facts* which induced the mental processes of the secretary, nor the *correctness* of his conclusions, but could consider only whether the secretary had exceeded his authority or whether the forms of law, which are not in-

dicated, had been observed.

Does this provide due process of law? And does a commission merchant who might thus be put out of business, have his day in court?

Suppose that a merchant who had been refused a license went ahead with his business and was prosecuted under the act. In such a proceeding he might contest the constitutionality of the Act, on the grounds herein advanced, but certainly the incorrectness of the secretary's conclusions in refusing the license, would be no defense in such a criminal action.

The decisions of this court, construing the due process clause of the constitution, all indicate that to be valid, a law which gives a commissioner or a board or an administrative official the power to control ones business or to keep one out of business, must furnish an aggrieved party a substantial and adequate right to judicial review.

Southern Pacific Co. vs. Campbell, 230 *U. S.* 537, holds that the Oregon railroad commission act is not violative of the Fourteenth Amendment as it provides for judicial review in the State courts of any orders of the commission of which complaint is made. The Act itself indicates clearly and completely the methods and procedure by which the complaining party may have his day in court.

Wadley Southern Rly. Co. vs. Georgia, 235 *U. S.* 651, considers the constitutionality of a law empowering a state commission to regulate a carrier. Speaking of the right of judicial review this court says:

> "And this right to a judicial determination exists whether the deprivation is by a rate statute passed without a hearing; or by administrative order of a commission, made after a hearing. For rates made by the general assembly, or administrative orders made by a commission, are both legislative in their nature and any party affected by such legislative action is entitled by the due

process clause to a judicial review of the question as to whether he has been thereby deprived of a right protected by the constitution. * * * But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

In *Hall vs. Geiger-Jones Co.*, 242 *U. S.* 539, the Ohio "Blue Sky Law" is held to be a valid exercise of police power, as in the sale of stocks, "the existence of evil is indicated, and a belief of its detriment * * * and the prevention of deception is within the competency of government." Power is given to a commissioner to issue and revoke licenses within his judgment as to the standing of the licensee, but as the statute provides for judicial review of adverse judgments, process of law is not denied the licensee.

Undoubtedly, the Act in question gives the secretary the power to deprive these plaintiffs in error of their property rights. Undoubtedly the plaintiffs in error may be deprived of their property rights by said secretary without due process of law unless the Act provides a "substantial, adequate and safely available" right of judicial review. The only right of judicial review given by the Act is by writ of certiorari, which writ does not exist in Kansas, except as it is provided for in the Act, and even if a ruling of the Secretary could be reviewed by a court by means of such a writ, the *correctness* of such ruling could not be considered. Surely due process of law, and the right to a judicial review of the administrative acts of the Secretary of the State Board of Agriculture are not thus afforded a commission merchant who is refused permission to conduct his business within the State of Kansas.

And if our conclusions are correct, the Act in question is violative of the due process clause of the constitution.

CONCLUSION.

The record before this court will indicate quite clearly how the legislature came to regulate the business of the grain commission merchants. The arguments of the Attorney General and the decision of the State Court are based entirely on fancied impositions by produce commission dealers that *might* be suffered by *truck gardeners*. Evidently some legislator failed to receive his desired price on a crate of consigned strawberries, and feeling himself incompetent to protect himself in his business dealings, he conceived the idea of making himself and other like producers wards of the State. The legislature, willing to attempt the control and regulation of any man's private business, borrowed a copy of a measure proposed in another state which has the writ of certiorari but no state grain weighers or inspectors, and promptly made it a law. It is evident from the opinion of the Kansas court that the regulation of the *grain* commission business was not requested or demanded by any one, or considered necessary on behalf of the public welfare or prosperity. A scattering shot was taken at some garden truck commission dealer, and the whole grain commission business of Kansas was brought down.

It will be noted that this Act was enacted, and this litigation was started long prior to the entrance of this country into the war, and long prior to the enactment by Congress of general food regulatory measures rendered necessary by the national emergency. No class of citizens has suffered the degree of business loss that the grain dealers have as a result of Federal control of the wheat markets, but they are not complaining for the public welfare demanded the measures en-

acted, and they were not discriminated against. But they do complain of a state law, enacted under no stress of war emergency, which very evidently was not meant for them, and which treats them, as a class, like confidence men or crooks, all without reason and all without regard for any rightful object which the legislature might have had in mind, and which subjects their very business existence to the caprice or whim of the Secretary of a corporation, all without any recourse to any due process of law.

The plaintiffs in error were invited into the State Court to show causes why the Act in question was invalid, and presented several such causes, which the state court ignored in its decision. And they now insist that the Kansas Supreme Court erred in determining that Chapter 371 of the Laws of Kansas of 1915 was not rendered invalid and unconstitutional, for the reasons assigned in their specifications of error herein; and pray that the decision of the state court be reversed.

Respectfully submitted,

RAY CAMPBELL,
Attorney for Plaintiffs in Error.

J Graham Campbell,
Of Counsel.

No. [redacted]49

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

W. S. PAYNE, L. H. POWELL *et al.*, *Plaintiffs in Error*,
vs.
THE STATE OF KANSAS, *ex rel.* S. M. BREWSTER, Attorney-general, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

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7-3781

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No. 739.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action in mandamus which was commenced as an original proceeding in the supreme court of Kansas, and which arose under chapter 371, Session Laws of Kansas of 1915, being an act entitled "An act in relation to the sale of farm produce on commission."

The act is set forth in full on pages 7 to 10 of the transcript. Its material provisions are as follows:

The Law.

Section 1 of the law provides that the term "commission merchant" shall include all those who receive, sell or offer for sale on commission any kind of farm produce, except where the produce is sold for consumption and not for resale, and except sales at public auction. And the term "farm produce" is defined to include all agricultural, horticultural, vegetable and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts and honey, but not to include timber products, floricultural products, tea or coffee.

Section 2 provides that it shall be unlawful to receive, sell or offer for sale on commission without a license; that such

license may be procured by applying, on or before June 1, to the secretary of the State Board of Agriculture, and stating in the application what kind of farm produce the applicant proposes to handle, the name of the applicant, and the name of his local agents. That if the applicant shall satisfy the secretary of the State Board of Agriculture of his character, responsibility and good faith the secretary shall issue, on payment of $10, and the execution of a bond, a license entitling him to conduct the business of commission merchant, and that the money shall be turned into the state treasury and set apart as a fund to be used by the secretary in conducting his work under this law.

Section 3 provides that before any license shall be issued the applicant shall execute and deliver to the secretary a bond to secure the honest accounting and payment to the consignor for goods consigned to the applicant, and further provides that any consignor may bring action upon the bond in a court of competent jurisdiction to recover payment for goods delivered.

Section 4 provides that the secretary shall have power to investigate, upon verified complaint, or upon his own motion, the record of any commission merchant, or to investigate any transaction in the commission business, whether there has been failure to make proper and true accounting or settlement, or whether false statements as to the condition, quality, or quantity of the goods received have been made, or a false statement as to market conditions with intent to deceive, or whether there has been a failure to make payment for goods received.

It further provides that a consignor, in case he fails to obtain a satisfactory settlement, may, after notifying the consignee, file a certificate complaint with the secretary, and that the secretary shall attempt to secure an explanation or adjustment, and failing in this shall cause a copy of the complaint, together with notice of time and place of hearing, to be served upon the commission merchant seven days before the hearing. That at the hearing the secretary shall enter an order either dismissing the complaint or specifying the facts established at the hearing, and, in case such facts are established as cause him to revoke the license, to bring an action upon the bond.

Section 5 provides that the secretary may decline to grant a license or may revoke a license already granted (*a*) when a

money judgment has been entered against the commission merchant, and an execution returned unsatisfied; (*b*) when false charges have been imposed for handling or for services rendered; (*c*) When there has been a failure to account promptly and properly, or to make settlement, with intent to defraud; (*d*) when false statements have been made as to condition, quality or quantity of goods; (*e*) when false or misleading statements have been made as to market conditions, with intent to deceive; (*f*) when there has been a combination to fix prices; (*g*) When the commission merchant has directly or indirectly purchased goods for his own account without authority; (*h*) when the commission merchant is insolvent, or in bankruptcy, or the secretary has reason to believe that bankruptcy or insolvency will shortly occur; (*i*) When there has been a continued course of dealing of such a nature as to satisfy the secretary of the inability of the commission merchant properly to conduct the business, or of intent to deceive or defraud; (*j*) when the commission merchant has been guilty of fraud or deception in obtaining his license; and (*k*) when the merchant neglects to file a new bond when notified by the secretary that his bond is unsatisfactory.

Section 6 provides that the action of the secretary in refusing or revoking a license shall be subject to review by writ of certiorari, and that if such proceedings are begun the license of the commission merchant shall be deemed in full force and effect until the final determination of such proceedings.

Section 7 provides that every commission merchant shall make a record of all transactions, showing the name and address of the consignor, the date of receipt, the kind and quality of produce handled, the date of sale, the price received, the name and address of the purchaser or his license number, where the same can be secured with reasonable diligence, and the items and expense connected therewith, and that a copy of this record, with payment for the shipment, shall be made to the consignor within forty-eight hours, unless otherwise agreed. That the record shall be retained for one year and be open to the inspection of the secretary and of the consignor, and that the burden of proof shall be upon the commission merchant to prove its correctness.

Section 8 imposes penalities of not less than $10 nor more than $500 for (*a*) imposing false charges; (*b*) failing to

account and to make settlement promptly with intent to defraud; (*c*) making false statements as to market conditions with intent to deceive; (*d*) entering into a combination to fix prices; (*e*) purchasing for his own account without authority; (*f*) making false statements as to grade, condition, marking, quality or quantity of goods, with intent to deceive; (*g*) failing to comply with this law; and (*h*) advertising or holding oneself out as a commission merchant without a license.

The Pleadings.

Under the Kansas practice relating to actions in mandamus the alternative writ stands as the plaintiff's pleading, and the only other pleading permitted is the answer or return, the allegations of which stand denied. (Sec. 7654, Gen. Stat. Kan. 1915.)

Plaintiff in error Payne, paid under protest to the secretary of the State Board of Agriculture the fee of $10 required by section 2 of the act, which sum the secretary, because of such protest, refused to pay over to the state treasurer, and this action was commenced to compel him so to do. Payne was made a party because he was interested in the disposition of the fund, and other commission merchants were permitted to intervene. The whole proceeding thus furnished an opportunity for a decision as to the validity or invalidity of the law, giving all who were interested in it an opportunity to be heard. This proceeding is justified by the Kansas practice.

State v. Dolley, 82 Kan. 533, 535.

State v. Railway Co., 81 Kan. 430, 435.

Livingston v. McCarthy, 41 Kan. 20.

And the same character to proceeding was before this court in *Wear v. State of Kansas*, 38 S. C. R. 55.

The writ (trans. 1) contains merely the allegations that the fee had been paid to the secretary of the State Board of Agriculture, and that he had refused to pay said fee into the state treasury.

The answer of the secretary of the State Board of Agriculture (trans. 2) states that he has no personal interest in the fee and that he stands ready to pay it over whenever he can do so without incurring personal liability.

The answer of the intervening grain commission merchants, in so far as its allegations relate to the federal questions open

to review here, alleges, that intervenors are subject to the law; that "these interpleaders" receive shipments of grain on consignment from elevators and country dealers and sell such shipments for the consignors and charge an agreed commission; that by the usages and customs of the grain trade "such consignments" are handled in the following manner:

A country shipper draws on one of the interpleaders, with bill of lading for the car of grain to be sold attached to the draft. The draft, which is for the approximate value of the shipment, must be paid before the bill of lading can be secured. The payment of the draft is in effect a payment in advance for the grain. After the interpleader has sold the grain he renders an account to the assignor, showing the amount and quality of grain sold, the price received, the name of the purchaser and the necessary charges for weighing, inspection, freight, etc., including a stipulated commission. If the net proceeds exceed the amount of the draft the excess is sent to the consignor; if it is less, the consignor is sent a bill for the deficiency.

It is further alleged that the average advances paid upon the drafts exceed the average net proceeds of the sales; that the grain sold by "these interpleaders" is sold on weights and grades determined by legally appointed inspectors at a market price fixed by the world, and that "these intervenors" have no control over the grade, quality or price of the grain sold or the fixing thereof, as the quantity and quality are known to the consignors; that "these interpleaders' business" is not with the public at large, but with a limited class of country elevators or grain dealers, and is not affected with a public use or interest; that "the business relations of these interpleaders" are contractual and not compulsory on the part of the consignors; that the interpleaders are members of the Wichita Board of Trade, and as such members are required to be and are of financial and moral responsibility; and that the act in question is void because it deprives interpleaders of their right to conduct their lawful business without interference, denies them the equal protection of the laws, and deprives them of property without due process of law.

It is to be noted that the answer does not attempt to describe the business of handling agricultural products generally on commission, or even the grain commission business

generally, but merely describes the particular business done by these intervenors.

The answer of W. S. Payne (trans. 6) admits the payment of the fee of $10 and alleges that the expense of keeping the records required by the law to be kept will ruin his business; that the law is not a proper exercise of the police powers of the state, because it interferes with private business, especially in that it requires that the name and address of the person to whom goods are sold be furnished to the consignor, since the list of customers is of great value; that the title of the act is insufficient; and that the act confers judicial power and corporate power in violation of the *state* constitution; that the act discriminates in favor of commission merchants of other states and against commission merchants of this state; and that the penalties are excessive.

The Evidence.

The only evidence offered was the affidavit of plaintiff in error Payne (trans. 15) and a statement verified by ten of the intervening grain commission merchants who are plaintiffs in error (trans. 16).

Payne in his affidavit states that he is in the general farm produce commission business, and that a compliance with the law by him will divert a great deal of his time and attention from his main business in order to take care of, account for and report sales of farm produce upon commission as contemplated by the law, and that the additional clerk hire and overhead expense necessitated will amount to $1,000; that the produce commission men of Wichita are among the most industrious and best business men of Wichita and men of honor and integrity, and that "to affiant's knowledge" there have been no complaints regarding their fairness, honesty and integrity, except in rare cases, and that every person engaged in the business in Wichita compares favorably in honesty, integrity, and character with merchants in other lines of business.

The verified statement filed by the grain commission merchants follows in substance their answer, but with some amplification. It describes the business of intervenors only and not the farm produce commission business generally, or even the grain commission business, except as it is conducted by these particular merchants.

ARGUMENT.

The Law as Applied to Farm Produce Commission Merchants Generally.

It is not contended by plaintiffs in error in their brief that the law in question is unconstitutional when applied to commission merchants who deal in produce (other than grain), fruit or garden truck upon commission. In fact it is practically admitted that the law is constitutional when so applied (brief for plaintiffs in error, pp. 2, 8).

The answer and affidavit of Payne are in fact proof of the necessity of the law as applied to such merchants. Section 7 of the law requires such merchants to make a record of all commission sales, showing the name and address of the consignor, date of receipt, kind and quality of produce, amount sold, with date and price and name and address of person to whom sold. Payne contends that the keeping of such record will involve great expense and that his list of customers is of value and that he should not be compelled to disclose their names to his consignors. Yet the statute requires only the furnishing to the consignor of such information as the consignor would be entitled to in its absence.

A commission merchant is only the agent of the consignor, and is charged with all of the duties of an ordinary agent. He must make full reports of his transactions to his principal, must deal fairly and honestly with his principal, and may not purchase from himself.

"A factor is generally defined to be an *agent* who as a business sells goods or merchandise, consigned and delivered to him by or for his principal, for a compensation commonly called factorage or commission."

19 Cyc. 115.

"It is held that it is the factor's duty to be prompt in rendering an account of his sales, whether requested to do so or not, and that a failure to render an account for an unreasonable time will render him liable—especially when a demand is impracticable or highly inconvenient. That he many render a satisfactory account it is his duty to keep books in which are entered correct accounts of his transactions, and the books

should be subject to the principal's inspection, and the principal is entitled to a correct copy of the entries in the books, including any memoranda connected therewith."

19 Cyc. 135.

The purchaser from a commission merchant becomes liable directly to the commission merchant's principal, and the commission merchant is therefore entitled to know the name and address of the purchaser.

"When payment is not made at the time of the purchase a sale by a factor creates a contract between his principal and the purchaser, and the latter has a right to pay the owner, in spite of the objections of the factor, and after notice of the claim of his principal the purchaser is bound to pay the proceeds to the principal."

19 Cyc. 173.

"Except in those cases in which the factor has a lien equal to or exceeding the value of the goods, the principal may sue for and recover in his own name the price of the goods sold for him by the factor, even though the principal was not disclosed, and the factor acted as the ostensible principal. The fact that the factor acted under a *del credere* commission does not change the rule. When the factor, having a lien upon the proceeds, has given notice to the purchaser not to pay the amount of it to the principal, the latter may recover the surplus; or, by satisfying the factor's claim, can recover the whole. In other cases the right of the principal to sue is paramount to that of the factor, and the principal, although previously undisclosed, may intervene at any time before the payment to the factor, and by notice to the purchaser require payment to himself."

2 Mechem on Agency, sec. 2574.

A commission merchant is held to the same degree of diligence and good faith as other agents.

"Like other agents in whom trust and confidence are reposed, the factor owes to his principal a high degree of fidelity and good faith. Unless the principal expressly consents to receive less, he has a right to demand from the factor an undivided allegiance to his interests, and the factor will not be permitted to put himself in such a position that his own interests or those of another client will come in conflict with those of his principal. Without the principal's full knowledge and consent, therefore, the factor can not represent both parties in the same transaction, nor may he be himself the other party, as by buying of or selling to himself."

2 Mechem on Agency, sec. 2524.

"The usual rule that an agent can not make a profit out of his position applies of course to the factor, who is entitled only to his commission, and must strictly account to his principal for all profits made. He can not place himself in any position which is antagonistic to his relation as agent for his principal."
19 Cyc. 116.

"An agent employed to sell flour on commission is presumed to act for his principal in making sales, unless it clearly appears that it was understood between the parties that the agent was dealing in the particular transaction with the principal on his own account, and where it does not so appear profits obtained by the agent in the sale of the principal's goods belong to the principal."
Thayer v. Hoffman, 53 Kan. 723 (syllabus).

Since Payne objects to the requirement of the law that he keep proper records and that he furnish the name of the purchaser to the consignor, the inference must be that he has not been in the habit of doing these things, although it was his duty to do them. It is difficult to understand how he could honestly account for sales of produce if he did not keep accurate accounts of his sales, or how a consignor could ascertain the correctness of his reports if he was unable to obtain the name of the purchaser of the produce. We say, therefore, that the contentions of Payne furnish ample justification for the law.

The Law as Applied to the Grain Commission Business.

As we have already pointed out, the intervening grain commission merchants have neither pleaded nor proved any facts relating to the conduct of the grain commission business generally. They have simply pleaded and proved the manner in which they carry on their own business. They contend that because *they* are honest and industrious and members of the Wichita Board of Trade, and because *they* buy only of elevators and dealers and advance the full value of the grain, any regulatory law applicable to the business in which they are engaged must be held unconstitutional unless they are excepted from its action. Their argument seems to be that the law should by its terms apply only to dishonest commission merchants and should except honest ones. This of course is not sound.

Any classification, no matter how sound and reasonable, must include within the class which is affected by a law individuals as to whom there may be no reason for the passage of the law.

"We have recognized the impossibility of legislation being all comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant. *Armour & Co. v. North Dakota*, 240 U. S. 510; *Miller v. Wilson*, 236 U. S. 373, 382, 383."

St. Louis Ry Co. v. Arkansas, 240 U. S. 518.

In *Miller v. Wilson*, 236 U. S. 373, the question was as to the validity of an eight-hour law for female employees of hotels. There this court said:

"The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences. It is impossible to deny to the legislature the authority to take account of these differences, and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will, as a whole, fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one, considered in its general application, the classification is not to be condemned. See *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 53, 54, 54 L. Ed. 921, 928, 929, 47 L. R. A. (n. s.) 84, 30 Sup. Ct. Rep. 676."

We submit, therefore, that the pleadings and proof regarding the manner in which intervenors conduct *their* business may be disregarded. We do not admit, by any means, that intervenors have shown that there is no necessity for the law even if it could be assumed that all grain commission merchants conducted their business as they do. It is true that they contend that they sell upon weights and grades officially ascertained, and at a price "fixed by the world," and that they generally advance the full value of the consigned grain. The

price of grain may vary several cents a bushel in a single day and the consignor will know only that his grain was sold on that day. There would be nothing to prevent the commission merchant from selling at the highest price reached on that day, and reporting the lowest.

"It had become a matter of common talk among the people that those who handled wheat imposed upon their consignors by reporting sales and accounting for the proceeds at the lowest prices at which that article had been sold within the period of time during which the sale could have been made, and without regard to the prices actually obtained. With prices fluctuating at all times, as is the fact in the wheat market, and rarely remaining stationary for more than a few minutes at a time, the oportunity for fraud seems to be without limit when selling this commodity on commission. In addition to this is the fact that the consignor usually resides at a considerable distance from the commission merchant, and is practically unable to discover whether he has been cheated or not."

State, ex rel., v. Wagener, 77 Minn. 483.

Moreover, the commission merchant deducts from the sale price of the grain the charges for weighing and inspection, freight, demurrage, switching, etc. (trans. 4). As to these the consignor is entirely at the mercy of the commission merchant.

Regulation of Private Business.

It is contended that the act is void because it regulates a private business which is not impressed with a public duty or interest. The police power of a state is not, however, arbitrarily limited by the fact that the evil sought to be remedied arises in connection with a private business.

"It is trite to say that practices, harmless of themselves, may, from circumstances, become the source of evil or may have evil tendency. *Murphy v. California*, 225 U. S. 623.

"But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration. . . ." *Rast v. Van Deman*, 240 U. S. 342, 635.

Referring to the case last cited, the court later said:

"We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the esti-

mate of the legislature, and there is no impeachment of such estimate in differences of opinion, however, strongly sustained. And by evils it was said there was not necessarily meant some definite injury, but obstacles to a greater welfare." *Armour & Co. v. North Dakota*, 240 U. S. 510, 513.

This court has so often sustained legislation regulating private business that, as was said in the *Rast* case, *supra*, "It would be an endless task to cite cases in demonstration." Some of the later cases in addition to the last two cases cited above are—

Otis v. Parker, 187 U. S. 606.
Central Lumber Co. v. South Dakota, 226 U. S. 157.
Keokee Coke Co. v. Taylor, 234 U. S. 224.

The Classification is Reasonable.

It is not necessary for the state to prove the facts upon which classification for the purposes of any law is based. The law must be presumed to be valid and the classification reasonable unless the contrary clearly appears, and if any possible state of circumstances would sustain the law, it must be held good.

"The presumption is always in favor of the validity of legislation, state or municipal; and if there could exist a condition of facts justifying the classification or restriction complained of, the courts are bound to presume that it did exist." 4 Enc. of U. S. Sup. Ct. Rep. 365.

In *Missouri Ry. Co. v. May*, 194 U. S. 267, this court said:

"When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leave untouched."

In *Erb v. Morasch*, 177 U. S. 584, this court said:

"With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracts of the respective railroads were such as to justify a different rule in respect to the speed of their trains."

In *Hing v. Crawley*, 113 U. S. 703, this court said:

"The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

In *St. Louis Ry. Co. v. Arkansas*, 240 U. S. 518, this court said:

"The distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary. We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant. *Armour & Co. v. North Dakota*, supra; *Miller v. Wilson*, 236 U. S. 373, 382, 383, 59 L. Ed. 628, 631, 632, L. R. A. 1915 F, 829, 35 Sup. Ct. Rep. 342."

For the reasons for the law in question, the court has not far to seek. It is a matter of common knowledge that for many years there have been great complaints made by the raisers of farm produce of the manner in which they have been treated by commission houses. The farmers who raise such produce ordinarily live at a distance from the place of business of the commission merchant, and cannot personally watch the transaction. Much of the produce is of a perishable nature, which must be handled promptly. If a commission merchant makes a false report regarding market conditions or the condition of the produce received, or of the necessary charges for handling the produce, the farmer has no way of ascertaining the truth regarding these facts. Commission merchants may purchase goods themselves at low prices and sell for their own profit at higher prices, or may arrange among themselves for the consignee to sell to another at a low price, which will be reported to the consignor, and thereupon resell, dividing the profits.

It is not contended that all commission merchants do these things, but charges are common against the business generally

that these things are done, and the honest merchant suffers with the dishonest merchant. It was to correct this abuse that the law was passed.

The court will take judicial notice of these facts. *State v. Wilson*, 61 Kan. 32, 43; *State, ex rel., v. Wagener*, 46 L. R. A. 442, 445, quoted from *infra*.

There may be varying degrees of evil as between the produce commission business and the grain commission business, but this is not fatal.

Miller v. Wilson, 236 U. S. 373.

In *State, ex rel., v. Wagener*, 77 Minn. 483, 46 L. R. A. 442, the court considered a law almost identical with the law under consideration here. In that case the court said:

"Obviously, the act was not intended as a measure for the accumulation of a public revenue, and, if sustained at all, it must be upon the ground that it is a lawful regulation for the public good—a legitimate exercise of the police power of the state. The design seems to have been to protect a large class of people, engaged in agricultural pursuits, and more or less remote from market, from imposition and actual fraud when intrusting their products and produce into the hands of commission men for sale. And it is no argument against the statute to say that commission men are engaged in a legitimate business, and for that reason are not subject to police regulation, if the public good demands it. The operation of railways, the conducting of banks, the loaning of money at interest, the insurance business, the operation of custom gristmills, or grain elevators and warehouses, peddling from house to house, and the keeping of bakeries, butcher shops, hotels, restaurants, and saloons, are each legitimate and lawful occupations in this jurisdiction; but all may be subject to police regulation, and most of them are. But of course, the right of the state to exercise police power over its citizens and their occupations is not unlimited. The term 'police power,' as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all. *Rippe v. Becker*, 56 Minn. 381, 38 L. R. A. 672, 71 N. W. 400. And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499. If, then, any

business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end.

"What evils or supposed evils did the members of the legislature have in mind, and were attempting to remedy, when enacting this law? The fact is that the public generally looked with distrust upon the methods of merchants engaged in selling agricultural products and farm produce upon commission, perhaps without good reason. It had become a matter of common talk among the people that those who handled wheat imposed upon their consignors by reporting sales and accounting for the proceeds at the lowest prices at which that article had been sold within the period of time during which the sale could have been made, and without regard to the prices actually obtained. With prices fluctuating at all times, as is the fact in the wheat market, and rarely remaining stationary for more than a few minutes at a time, the opportunity for fraud seems to be without limit when selling this commodity on commission. In addition to this is the fact that the consignor usually resides at a considerable distance from the commission merchant, and is practically unable to discover whether he has been cheated or not.

In *Ferguson v. Fidelity & Deposit Company of Maryland*, 140 Pac. 704, the same law was held constitutional by the supreme court of the state of Washington.

In *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610, a similar law, applying only to butter and cheese factories, which received milk and cream from farmers, manufactured it and sold it, retaining only a commission for their services, and accounting to the farmers for the balance, was held constitutional, the court saying:

"It is true the act does require the manufacturer, at the end of each month, 'to make, acknowledge, subscribe and swear to a report, in writing, showing the amount of products manufactured, the amount sold, the prices received therefor, and the dividends earned and declared for the third month preceding the month in which the report is made, and to file a copy of the same with the clerk of the town or precinct in which the factory is located. This, in terms, falls far short of a conflict, in terms, with that constitutional provision, nor does it conflict in spirit. Here the manufacturer receives the property of a portion of the community to manufacture, sell,

and return to them the amount received, over and above his charges for manufacturing the material into the article prepared for the market. This provision is clearly intended to protect the persons intrusting their property to the manufacturer, from wrong and fraud. This is not an unusual exercise of power. It has always been required that executors and administrators intrusted with the property of estates shall file in a public office a full and complete account of their actions with reference to the property thus intrusted to their management and control. This law only requires the manufacturer to render an account of his management of other people's property. He holds himself out as a factor for the management and sale of other people's property, and in that respect is like a public warehouseman.

"It is also objected that the legislature had no power to require the manufacturer to give the bond required to enable the manufacturer to commerce or continue business, in this mode, in an innocent and lawful business. The business of selling liquor by saloon-keepers is lawful, unless prohibited by law, and all persons might carry on the traffic; but the law has imposed as a condition that all persons shall execute a bond that they will not violate the law, before engaging in that traffic, and such a bond is intended as a security for damages he may inflict on persons injured by violating the law. The bond in this case is intended to secure those who intrust their property to the keeping of the manufacturer, against fraud or misappropriation by him of their property, just as the executor or administrator is required to give bond to secure those entitled to the funds of the estate, or the saloon-keeper to give security that he will not violate the law, and thus inflict injury on his customers. . . .

". . . If that were conceded to be true, what provision of the Constitution forbids the legislature from exercising the power? We are aware of none. Most, if not all, of the States in the Union have required that persons in almost every species of business should procure and pay for a license to enable them to pursue the calling. Nor so far as we are aware, has the constitutionality of such laws ever been questioned. They were undeniably a regulation, if not a restraint on trade and yet the power was clearly legislative, and properly exercised. It may be said that was a revenue measure. Admit it, and where is the distinction between the exercise of legislative power to raise revenue, and to protect the people from wrong, oppression and fraud? That body is fully empowered and charged with the duty of performing both acts. Nor are the courts invested with a particle of power to review or control the acts of that body, so long as it keeps within the limits of its constitutional powers. With the wisdom of its acts the

courts have no concern, so long as it does not transcend its powers. . . .

"It is said that this is not a police regulation. That may be true, if the term were confined merely to the protection of the health and morals of the people. The term has a much more comprehensive meaning. It has been defined to be: 'The regulation and government of a country or city, so far as it regards its inhabitants.' Also, 'the laws, ordinances and other measures which require the citizens to exercise their rights in a particular form.' It is true there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the constitution, it has reference to the more restricted meaning of the term. When exercised by the legislature, in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property, or laws for the general welfare, the only limitations to restrain its action must be found in the constitution. This, in the larger sense, is an exercise of the police power by the general assembly, and falls fully within legislative power, and sustains the enactment under consideration."

The law in question was copied verbatim from the New York law, passed in 1913 (chapter 457, Laws of New York of 1913). We are advised by the counsel of the State Board of Agriculture of New York that no attack has been made upon the constitutionality of their law.

The state of Alabama passed a law substantially similar in 1915.

In *State, ex rel., v. Wagener*, 77 Minn. 483, 46 L. R. A. 442 447, where the classification was the same as in the law under consideration, the court said:

"But the class here created consists of those who engage in the business of receiving agricultural products and farm produce for sale, or receive or solicit the same for sale; in short, those who are engaged in the business of selling the same. The class is as broad as it need be. The peculiar characteristics of the agricultural products and farm produce already referred to, and the liability to peculiar abuses resulting from a sale thereof on commission, are such as to suggest the practical necessity for distinctive legislation on the subject—different from what would be expedient or necessary in the face of other property sold on commission—and to justify the legislature, in its discretion, in putting those who sell them on commission in a class by themselves. It was the evils which were thought incident to the sale of agricultural products and farm produce which evoked the law. Here was a class of merchants who for certain reasons, hereinbefore specified, had peculiar opportunities to defraud, not common to

other merchants, although they might sell on commission, and it was this class that the legislature proposed to put under restraint. Nothing is proved by arguing that there are other lines of business conducted in quite as objectionable a manner; for, if the argument had merit, it would follow that all kinds of business which need regulation must be legislated upon at the same moment. The legislature may proceed as the public welfare and prosperity of the citizens it represents may seem to demand."

In *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610, 616, where the law applied only to commission merchants who handled milk, the court said:

"It is urged that the law is not general, but applies to the private patrons of those factories, to secure them against the acts of their commission merchant or milk broker, and is class legislation. We fail to perceive that this is not a general law. It embraces all persons in the State similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. The law defining the crime of horse stealing is intended for the protection of the owners of such animals, and they form a class; but a large portion of persons in the State do not own such animals, and shall it be said that law is void because it is class legislation? It has never occurred to any one to urge such an objection against the law. The same may be said of most, if not all other laws, however general their character. A law is general not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced."

In *Lasher v. People*, 183 Ill. 226, 47 L. R. A. 802, where the law applied to dealers in farm products, except grain, live stock, and dressed meats, the court said:

"It is first argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, live stock, and dressed meats. The claim is that produce commission merchants constitute a class, and that the legislature must require a license from all or none. This objection to the law is not valid. The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission mer-

chants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock, and dressed meats. The state laws for the inspection of grain provide for the protection of shippers in that market, and there is also state inspection of live stock and dressed meats. The law which classifies small commission merchants engaged in the produce commission business rests upon a reasonable ground as a basis of classification. Such a business may afford great opportunities for swindling, and be productive of great abuses, and the legislature may properly enact a law applying to cities of such size as in the legislative judgment would permit the growth and existence of such abuses."

We, submit, therefore, that there is no unreasonable classification involved in this law, and therefore no deprivation of property without due process of law, and no deprivation of equal protection of the law.

It is contended by counsel for plaintiffs in error that the classification is unreasonable in that it does not include in the class covered by the law those who handle cattle, pianos, implements, jewelry or books upon commission. The distinction, however, between such commission merchants and those who are covered by the law in question is obvious.

When cattle are sent to market they are almost invariably accompanied by the owner or his representative, who is carried by the railroad company to the market free and who is returned to his home without charge. He is present with the cattle until they are sold, and able at all times to watch the transaction. Cattle are sold by commission merchants who do not handle farm produce generally, and whose business is entirely separate and distinct from that of commission merchants who handle products of the soil only. While it is true that cattle commission merchants might possibly have been included in the present law, or that a separate law regulating them might be passed, it does not follow that the law in question is void because they are not included in its terms. The classification here is a good example of classification according to varying evils referred to in the cases cited *supra*.

As to those who handle pianos, implements, jewelry or books upon commission, the distinction is clear. Farm produce and grain must be put upon the market as soon as received at the market. Produce will rapidly decay and the expense of storing

grain at the market is so high that the grain cannot be held there. The consignor cannot ordinarily put his price upon the product, but sends it to the commission merchant to be put immediately upon the market for the best price that can be obtained. In the case of pianos, implements, jewelry or books, the articles are not sent to the commission merchant for the purpose of being immediately put upon the market, but are sent to be disposed of in the usual course of business at a price fixed by the consignor.

Due Process of Law.

The secretary of the State Board of Agriculture is a state officer whose salary and expenses are paid by the state. He is elected by a state board composed of delegates from each of the county or district agricultural societies in the state, and is required to perform all duties imposed upon him by the legislature. This board is not, as is stated by counsel for plaintiff in error in their brief, a corporation; it is a state board. The manner of his election is immaterial. Throop on Public Officers, section 85; *Travelers Insurance Company v. Oswego*, 59 Fed. 58; *Sturges v. Spofford*, 45 N. Y. 446; *In re Bulger*, 45 Cal. 553.

The practice of conferring upon nonjudicial officers administrative duties of the character of those imposed by the law in question upon the secretary of the State Board of Agriculture has frequently been sustained by this court. *Meffert v. Medical Board*, 66 Kan. 710, 195 U. S. 625; *Dent v. W. Va.*, 129 U. S. 114; *Reetz v. Mich.*, 188 U. S. 505.

It is contended by counsel for plaintiff in error that the writ of certiorari provided for by the act does not permit an adequate judicial review.

In laws of this character it is not necessary that a judicial review of any kind be expressly provided. The courts are open to any litigant who has been injured through arbitrary or fraudulent action of administrative officers or boards, and if the act does not attempt to take away entirely the right to such judicial review, such right is implied. This is, and always has been, the law in Kansas. *Photoplay Corporation v. Board*,

102 Kan. 356. In its opinion, in the case at bar, the state supreme court said on this question:

"The exercise of such power is merely the exercise of administrative discretion. If this power is abused, the courts are open to the aggrieved party; if not by some statutory review, then by the extraordinary prerogative remedies of injunction or mandamus." (Tr. 26.)

It is true that the writ of certiorari has been abolished by the legislature of Kansas, and it must be equally true, as was said by the state supreme court in its decision in this case, that the legislature which abolished that writ may restore it. In restoring it, it has restored it as a writ which gives the full relief to which any one aggrieved by arbitrary action of an administrative board would otherwise be entitled to. In its opinion in this case the state supreme court said:

"But our legislature, which abolished the writ in 1868, had undoubted power to reëstablish it in 1915. The name and style of the writ is unimportant. Long ago this court, in conformity to the temper of this state, established the doctrine that the substance and not the form of things is the chief object in the administration of justice. . . . It will thus be seen that in practical operation in modern times, either by statute or by judicial enlargement of its use, certiorari will lie not alone to an inferior court, but to statutory boards and officers. And surely the legislature, which has full power to prescribe jurisdiction and procedure, may grant a judicial review or a *cause of action* from the acts of the secretary of the State Board of Agriculture, and in so doing the legislature may label that review or cause of action certiorari, or give it any other convenient name." (Tr. 28 and 29.)

It is clear from this that the court in holding that a cause of action was vested in the aggrieved party intended to hold that the aggrieved party was entitled to full and adequate relief.

Mr. Justice Marshall, of the state supreme court, dissented from this opinion on the ground that certiorari would lie only to review judicial acts, but said in his dissenting opinion:

"Without section 6 the act remains a complete and systematic whole, and can be administered according to its every intent and purpose; and any person injured by any act of the secretary has a right of action in any court of competent jurisdiction."

This right of action is recognized both by the majority of the court and by the dissenting judge, but the only difference between them is as to the use of the word "certiorari."

Respectfully submitted.

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